FILE COPY

FILED
MAR 2 1959
JAMES R. BROWNING, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1958.

No. 740.

ELLA V. FORE,
Appellant,

v.

JAKOBINE TOTH,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO.

JURISDICTIONAL STATEMENT.

MAURICE F. HANNING,
J. KING ROSENDALE,
1500 Midland Bldg.,
Cleveland, Ohio,
Counsel for Appellant.

McAFEE, HANNING, NEWCOMER & HAZLETT,
1500 Midland Bldg.,
Cleveland, Ohio,
Of Counsel.

THE STATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 1-5647

TABLE OF CONTENTS.

Opinion Below 1

Jurisdiction 2

Statute of Ohio, the Validity of Which Is Involved 2

Questions Presented by This Appeal 2

Statement 4

1. The Facts 4
2. How the Federal Questions Are Presented 10
3. The Federal Questions Were Properly Raised 11

The Questions Are Substantial 12

The First Constitutional Question 13

The Second Constitutional Question 20

The Third Constitutional Question 21

Appendices:

A. Opinion of the Supreme Court of Ohio 23

Decision of the Supreme Court of Ohio Overruling Application for Rehearing 34

Decision of the Court of Appeals 34

B. Ohio Revised Code Section 2111.02 45

C. Judgments of the Supreme Court of Ohio 46

Judgment of the Court of Appeals 47

TABLE OF AUTHORITIES.

Cases.

American Surety Co. v. Baldwin, 287 U. S. 156 11

Brinkerhoff-Faris Trust Co. v. Hill, 281 U. S. 673 11

Chessman v. Teets, 354 U. S. 156 20

Clayton, In Re, 61 Bull. 355 (1916) 14

Cole v. Arkansas, 333 U. S. 196 11

Commonwealth ex rel. Graham v. Graham, 80 Atl. 2d 829, 367 Pa. 533 15

DeMoss v. Conart Motor Sales, Inc., 149 Ohio St. 299 6

Flournoy v. Wiener, 321 U. S. 253 13

Great Northern Ry. Co. v. Sunburst Oil Co., 287 U. S. 358 11

Hampshire, In Re, 17 O. App. 139 (1922) 14

Hughes v. Fetter, 341 U. S. 609 2, 13, 16

Interstate Commerce Commission v. Louisville and Nashville Railroad Company, 227 U. S. 88 21

Kedroff v. St. Nicholas Cathedral, 344 U. S. 94 2, 13

Lehmer v. Hardy, et al., 294 Fed. 407 18

Maxson, John R., Lessee of, v. Sawyer, 12 Ohio 195 (1843) 14

May v. Anderson, 345 U. S. 528 2, 13, 16, 17, 19

Missouri ex rel. Missouri Ins. Co. v. Gehner, 281 U. S. 313 11

Murray, James Edward, In Re Guardianship of, 4 O. N. P. (N. S.) 233 (1906), affd. in 8 O. C. C. (N. S.) 498 14

Naylor v. Naylor, 143 A. 2d 604, 217 Md. 615 19, 20

New York ex rel. Halvey v. Halvey, 330 U. S. 610 16, 17

Ohio ex rel. Bryant v. Akron Park District, 281 U. S. 74 11

Pink v. A. A. A. Highway Express, 314 U. S. 201 16

Prudential Ins. Co. v. Cheek, 259 U. S. 530 13

Saunders v. Shaw, 244 U. S. 317 11

State ex rel. Larson v. Larson, 190 Minn. 489, 252 N. W. 329 19

State ex rel. Novak v. Bright, 165 Ohio St. 363 6

State ex rel. Schneider v. Blythin, 157 Ohio St. 66 6

Vanderbilt v. Vanderbilt, 354 U. S. 416 18

Viering v. Scott et al., 152 Ohio St. 211 5

Wilson v. Cook, 327 U. S. 474 11

Texts.

25 *Am. Jur.*, pp. 22-23 14, 19

Restatement of Conflict of Laws, §§ 117, 144, 149 and 151 14

Constitution.

Constitution of the United States:

Art. IV, Sec. 1 2, 3, 11, 21

Fourteenth Amendment 4, 12, 21

Statutes.

Ohio Revised Code:

Sec. 2111.02 2, 7, 10, 11, 13, 14, 15, 19

Secs. 2151.01 *et seq.* 19

Secs. 2321.01 to 2331.12 5

28 U. S. C. 1257(2) 2

28 U. S. C. 1257(3) 13

In the Supreme Court of the United States

OCTOBER TERM, 1958.

No. .

ELLA V. FORE,
Appellant,

v.

JAKOBINE TOTH,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO.

JURISDICTIONAL STATEMENT.

Appellant appeals from the judgment of the Supreme Court of Ohio entered on January 14, 1959 denying her Application For Rehearing from the judgment of that Court entered on December 24, 1958, setting aside the judgment of the Court of Appeals for the Eighth District, Cuyahoga County, Ohio (hereafter referred to as Court of Appeals), and submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW.

The opinion of the Supreme Court of Ohio is reported in 168 Ohio St. 363, and the overruling by that Court of Appellant's Application For Rehearing is reported in 32 Ohio Bar No. 3, page 54. The opinion of the Court of Appeals (the trial court) is reported in 151 N. E. (2d) 777 and 79 Abs. 15. The decisions of the Supreme Court of Ohio and that of the Court of Appeals are reproduced in Appendix A hereto.

JURISDICTION.

The judgment of the Supreme Court of Ohio denying Appellant's Application For Rehearing was entered January 14, 1959, and Notice of Appeal was filed in that Court on January 23, 1959. The jurisdiction of this Court is conferred by Title 28, United States Code, Section 1257(2). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Kedroff v. St. Nicholas Cathedral*, 344 U. S. 94; *Hughes v. Fetter*, 341 U. S. 609; *May v. Anderson*, 345 U. S. 528.

STATUTE OF OHIO, THE VALIDITY OF WHICH IS INVOLVED.

The statute of Ohio, the validity of which has been sustained by the final judgment of the Supreme Court of Ohio, the highest court of the state, overruling Appellant's Application For Rehearing, as not being violative of or repugnant to the Constitution and laws of the United States, is Section 2111.02 of the Ohio Revised Code. This statute is set forth in Appendix B hereto.

QUESTIONS PRESENTED BY THIS APPEAL.

The following questions are presented by this appeal:

1. Did the Supreme Court of Ohio, by denying in its judgment of January 14, 1959 Appellant's Application For Rehearing, violate the Full Faith and Credit Clause of the Constitution of the United States, Art. IV, Sec. 1, in which application the claim was expressly made that the judgment of that Court rendered December 24, 1958 construing Sec. 2111.02 of the Revised Code of Ohio so as not to require a child to have a domicile or legal settlement in Ohio was violative of such Constitutional provision?

2. Did the Supreme Court of Ohio, by failing to give full faith and credit in its said judgments rendered respectively December 24, 1958 and January 14, 1959, to the judgment of the Fifth District Court, Parish of Franklin, State of Louisiana rendered April 11, 1958 pursuant to the applicable statutes of that State, violate the said Art IV, Sec. 1 of the Constitution of the United States by holding the mere physical presence of the child in Ohio was sufficient for Ohio to make an award of custody to the exclusion of Louisiana, the domiciliary state?

3. Did the Supreme Court of Ohio, by deciding this case with no bill of exceptions certified by the Court of Appeals, the trial court, bringing up the transcript of testimony and exhibits introduced before the Court of Appeals and therefore with absolutely no facts properly before it and only from the journal entry of the Court of Appeals, which journal entry stated no findings of fact, but only that Court's ultimate conclusions of law by which the Court of Appeals gave full faith and credit to the said judgment of the Fifth District Court, Parish of Franklin, State of Louisiana, and held the judgment of the Probate Court of Cuyahoga County rendered December 2, 1957 void *ab initio*, violate Appellant's right to the procedural due process of law guaranteed in the Fourteenth Amendment to the Constitution of the United States?

4. Did the Supreme Court of Ohio, by its total failure to rule on Appellant's Motion to Strike Material Extraneous and Prejudicial from the brief of Appellee filed with the said Supreme Court of Ohio and that Court's consideration of the said extraneous and prejudicial material, which had not been introduced in evidence before the Court of Appeals, the trial court below, constitute a violation of Appellant's right to the procedural due process of

law guaranteed to Appellant by the Fourteenth Amendment to the Constitution of the United States?

STATEMENT.

1. The Facts.

Ella V. Fore, Appellant, a resident of the State of Louisiana, applied to the Court of Appeals on April 21, 1958 for a writ of habeas corpus for the custody of a three year old child, Donald Peter Fore. Appellant is the paternal grandmother of the child. She had been appointed guardian of the person and estate (Tutrix) of this child by Letters issued by the Fifth District Court, Parish of Franklin, State of Louisiana, April 11, 1958, pursuant to a judgment of that Court dated the same day (Transcript of evidence taken before Court of Appeals, hereinafter referred to as Tr., at pages 50-52). Under the applicable laws of that state (Tr. pp. 47-49), she, the child's paternal grandmother, is the proper guardian (Tr. pp. 47-49). The Louisiana Court also appointed an undertutor, as required by Louisiana law (Tr. p. 52).

This action was brought by Mrs. Fore against one Jakobine Toth, Appellee herein, the maternal aunt of this child. Mrs. Toth was purportedly appointed guardian of the person and estate of this child by Letters issued by the Probate Court of Cuyahoga County, State of Ohio, on December 2, 1957. Her application was granted forthwith "without notice to anyone" (see opinion of Court of Appeals, 151 N. E. 2d 777 at page 779 and as set forth in Appendix A hereto), the application and judgment being dated the same day and no hearing was had on the matter (Respondent's Exhibits 2 and 7 to Tr.). The writ of habeas corpus was issued April 21, 1958 requiring Appellee to show cause why the child should not be given to Appellant

pursuant to the Louisiana judgment. Personal service of this writ was had on Appellee on April 22, 1958.

After a complete record of testimony had been taken, exhibits introduced into evidence, and the case submitted on briefs and oral argument, the Court of Appeals ruled that the Probate Court of the same county and state had absolutely no jurisdiction to make an award of custody and appoint the Appellee as guardian, that such judgment was void *ab initio*, and that full faith and credit must and should be given to the judgment of the Louisiana Court appointing the Appellant the guardian, because the domicile of the child's parents and hence that of the child, was in the Township of Winnsboro of that state and Louisiana was the only state with the jurisdiction to appoint a guardian for the child.

A journal entry embodying that opinion was entered on July 15, 1958. (See the transcript of the proceedings before the Supreme Court of Ohio, hereinafter referred to as R., at p. 19. This journal entry is reproduced in Appendix C hereto.) This order was suspended during the pendency of an appeal taken by the Appellee herein from the judgment of said Court of Appeals to the Supreme Court of Ohio. The appeal was on questions of law, necessitating under Ohio law a full review of the evidence by way of a bill of exceptions bringing up the transcript of testimony. Under Ohio appellate procedure the pleadings and journal entries are sent to the reviewing court by the clerk of the lower court, but the transcript of evidence and exhibits must be embodied in a bill of exceptions certified to be correct by the court whose judgment is to be reviewed. See Sections 2321.01 to 2321.12 of the Ohio Revised Code. The failure to prepare and file such a Bill of Exceptions necessitates a dismissal of the appeal: *Viering v. Scott et al.*, 152 Ohio St. 211, 212;

De Moss v. Conart Motor Sales, Inc., 149 Ohio St. 299; *State ex rel. Schneider v. Blythin*, 157 Ohio St. 66; *State ex rel. Novak v. Bright*, 165 Ohio St. 363. No such bill of exceptions was ever filed in the Supreme Court of Ohio. See 168 Ohio St. at page 372 and the certification of Clerk of Court of Appeals certifying Tr. etc. to this Court.

Appellant herein filed a motion to dismiss the appeal (R. p. 12) because the Supreme Court of Ohio had no facts before it, and a motion to strike material extraneous and prejudicial from the brief filed by Appellee in the Supreme Court of Ohio. (R. p. 10.) The motion to strike material extraneous and prejudicial was never ruled on by that Court, and the motion to dismiss the appeal was only ruled upon in its opinion (168 Ohio St. 363 at 372) in which the Court held a bill of exceptions to be unnecessary. After oral argument in the Supreme Court of Ohio, Appellee, in an effort to rectify her failure to file a bill of exceptions bringing up the transcript of testimony taken before the Court of Appeals to the Supreme Court of Ohio, filed a motion (a copy of which has been certified to this Court by the Clerk of the Court of Appeals) in the Court of Appeals to vacate his judgment dated July 15, 1958 so as to give her time to file a bill of exceptions within the statutory period. This motion was denied (see the journal entry denying this motion certified by the Clerk of the Court of Appeals). The Supreme Court of Ohio determined this case upon the journal entry of the Court of Appeals alone (168 Ohio St. 363 at 372), which sets forth absolutely no facts but only the ultimate conclusions of law of the Court of Appeals (R. p. 19 and Appendix C hereto). Since no bill of exceptions was filed by the Appellee herein in the Supreme Court of Ohio taking up the transcript of the evidence taken before the Court of Appeals, it has been necessary

for the Clerk of the Court of Appeals in response to a precipe to certify the transcript of the evidence and certify other items of evidence separately from the record certified by the Clerk of the Supreme Court of Ohio pertaining to the proceedings in that Court.

In its opinion the Supreme Court of Ohio held that it is not necessary for a child to have a legal settlement or domicile in Ohio under Section 2111.02 of the Ohio Revised Code for the Probate Court to have jurisdiction to appoint a guardian. The syllabus of the case which, under Ohio law is the law of the case, expressed by the Court, reads:

> "1. Where there is no existing award of custody of an orphaned minor resident of Ohio by a foreign court, the Probate Court of the county of such residence has jurisdiction, under Section 2111.02, Revised Code, to appoint a guardian of the minor, irrespective of the fact that the domicil of such minor may be in another state.
>
> "2. A decree of guardianship of a minor resident of Ohio by a court in a state where the child has a technical domicil, which decree is made without personal service on either the child or the person with whom such child is living, is not entitled, under Section 1, Article IV of the Constitution of the United States, to such faith and credit as will nullify the prior appointment of a guardian of such minor by the Probate Court of the county of his residence."
>
> 168 Ohio St. 363.

Thereupon, Appellant filed an Application For Rehearing (R. p. 34) which was denied without opinion. Well may we ask, without a bill of exceptions before it how the Supreme Court of Ohio could have known there was "no existing award of custody." In fact there was outstanding an existing award by Mississippi which had never

been litigated in Ohio. How also, with no facts before it could the Court have found the child was a "resident" of Ohio? The Court of Appeals had ruled to the contrary (see below).

Upon Appellant's Motion, the Supreme Court of Ohio stayed the issuance of its mandate until all matters are disposed of by the Supreme Court of the United States (R. pp. 6 and 7).

Donald Peter Fore, the minor whose custody is the subject of this litigation, is the son of Donnie R. Fore, a.k.a. Donald R. Fore, and his wife, Francaska Haas Fore (Tr. p. 40). They were both killed as a result of a common disaster in Ingrandes, France, September 7, 1957. The father was a Master Sergeant in the United States Army. The mother was a German girl whom he married in 1952, and who was a naturalized citizen of the United States. Master Sergeant Fore was a resident of Winnsboro, Louisiana, and was born there December 19, 1922 (Tr. pp. 4, 14). He enlisted in the United States Army in 1941 and had served continuously in the Army ever since (Tr. pp. 1-10). Consistently, his Army record has always shown him listing Winnsboro, Louisiana as his permanent address (Tr. pp. 1-10). His wife was also a resident of Winnsboro, Louisiana (Tr. p. 10), and neither had ever set foot in the State of Ohio (Tr. p. 109). It was Sergeant Fore's intention to return to Winnsboro, Louisiana, and build a home there upon his release from overseas duty (Tr. pp. 15 and 28).

On October 18, 1957 the Chancery Court of Amite County, Mississippi, appointed Mrs. Ida Fore Tillery, a sister of Master Sergeant Fore, the legal guardian of the child under the laws of that state. The child being in France, there remained the problem of transporting him

to the United States to Mrs. Tillery who, at that point was the only person who had been appointed guardian by a court of any jurisdiction (Tr. p. 115).

On October 21, 1957, the Adjutant General of the United States directed a telegram to Mrs. Tillery asking whether she would meet her nephew (Tr. p. 46). Mrs. Tillery immediately replied that she would and requested delivery of the child if possible at Jackson, Mississippi.

On October 25, 1957, Mr. Fred A. Anderson, Jr., a Mississippi Attorney, was informed by Colonel Charles M. Munnecke, Chief, Legal Assistance Division, Department of the Army, Washington, D. C. that the child had been delivered to Jakobine Toth, a resident of Cleveland, Ohio, "to escort" him to the United States (Tr. p. 46). Mr. Anderson strenuously objected to this procedure, and was advised by Colonel Munnecke by telephone that the child would arrive at Idlewild Airport, New York. (Tr. p. 46).

The child being in the hands of Appellee, who had flown over to Europe and returned with the child on November 18, 1957 (Tr. p. 78), Mrs. Tillery brought an action in habeas corpus in the Supreme Court of New York for custody of the child. The writ was denied (Tr. p. 78). The Appellee proceeded to Cleveland, Ohio, with the child and as stated above was awarded custody of him by the Probate Court of Cuyahoga County on December 2, 1957. Thus, exactly fifteen days intervened between the child's arrival in the United States and the *ex parte* Ohio award of custody. As the Court of Appeals said in its opinion (151 N. E. 2d at 781), "There is no claim here that Donald Peter Fore had a 'legal settlement' in Cuyahoga County nor do the facts justify a determination that he was, when the action was commenced, a *resident* of this State." (Emphasis supplied.)

2. How the Federal Questions are Presented.

As shown by the transcript of the proceedings before the Supreme Court of Ohio (R. p. 34) Appellant applied for rehearing from the judgment rendered by the Supreme Court of Ohio on December 24, 1958 in this case making the claim that this decision contravened the Full Faith and Credit Clause of the United States Constitution, that the decision by that Court with absolutely no facts before it was in derogation of Appellant's rights to procedural due process guaranteed by the Fourteenth Amendment to the United States Constitution, and that its failure to rule on Appellant's Motion to Strike material extraneous and prejudicial from the brief filed by Appellee in that Court together with its consideration of the same, which consisted of a purported transcript of testimony taken before the Supreme Court of New York, which had never been introduced in evidence before the trial court, the said Court of Appeals, was also in derogation of Appellant's right to the procedural due process guaranteed by that Amendment.

Appellant's claim in her Application for Rehearing that the Full Faith and Credit Clause of the United States Constitution had been violated rests on the construction the Supreme Court of Ohio gave to Section 2111.02 of the Ohio Revised Code. Previously it had been held in all of the Ohio cases that a child must have a domicile in the county in Ohio in which the Probate Court was situated for it to have jurisdiction to appoint a guardian. The Court of Appeals consistently with these decisions so held. In this case the Supreme Court of Ohio, for the first time, held a domicile or legal settlement in Ohio to be unnecessary to give an Ohio Probate Court jurisdiction to appoint a guardian, and interpreted the word "residence" in the statute so as not to mean "domicile" as had always

been held. This interpretation of Section 2111.02 violates the Full Faith and Credit Clause of the United States Constitution as it construes it so as to prevent the recognition by Ohio of the rights of the domiciliary state and its valid judgment, given pursuant to its statutes, which are entitled to full faith and credit under the United States Constitution, Article IV, Section 1.

On her Application for Rehearing Appellant expressly claimed that the statute as so construed contravened the Full Faith and Credit Clause. (R. pp. 41, 51.) Thus the claim was squarely presented to the Supreme Court of Ohio that the statute was void under Article IV, Section 1 of the United States Constitution.

3. **The Federal Questions Were Properly Raised.**

Thus, these Federal questions were raised at the first opportunity presented for Appellant to raise them since until the Supreme Court of Ohio ruled as it did they could not have been raised, the decision of the Court of Appeals having been in Appellant's favor. When the claim is so presented this Court has held that the Federal questions are timely raised, even though the application for rehearing is summarily denied without reference to the Federal questions. See, *Great Northern Ry. Co. v. Sunburst Oil Co.*, 287 U. S. 358, 366-7; *Brinkerhoff-Faris Trust Co. v. Hill*, 281 U. S. 673, 677-8; *Ohio ex rel. Bryant v. Akron Park District*, 281 U. S. 74, 79; *Missouri ex rel. Missouri Ins. Co. v. Gehner*, 281 U. S. 313, 320; *Saunders v. Shaw*, 244 U. S. 317, 320; *Cole v. Arkansas*, 333 U. S. 196, 200; Cf. *American Surety Co. v. Baldwin*, 287 U. S. 156, 162-4; *Wilson v. Cook*, 327 U. S. 474, 485.

The claim that Appellant was entitled to the child under the laws of Louisiana and that the order of the

Probate Court of Cuyahoga County, Ohio was void *ab initio* was raised in Appellant's Petition for Writ of Habeas Corpus filed in the Court of Appeals and that Court's judgment as stated in its journal entry (Appendix C hereto) was that the Ohio decree of custody was void *ab initio*, and that full faith and credit must and should be given to the Louisiana decree, and the Supreme Court of Ohio expressly ruled otherwise on this question in its decision, 168 Ohio St. at 371-372.

THE QUESTIONS ARE SUBSTANTIAL.

The federal questions involved in this appeal are:

(1) May a state interpret its statute governing the appointment of guardians so as to deny to the state of a child's domicile the right to have its valid judgments accorded full faith and credit by such state? May a state deny Full Faith and Credit to the valid judgment of another state in the circumstances of this case where the child whose custody is sought was brought into Ohio by no legal right or authority and immediately and summarily and without Notice the Appellee was appointed his guardian?

(2) May a state appellate court render a judgment reversing a lower court with no legitimately presented facts before it on which to base its decision without offending the procedural due process of law guaranteed in the Fourteenth Amendment to the United States Constitution?

(3) May a state appellate court consider as evidence an unauthenticated transcript of testimony in another and extraneous matter, which transcript was never introduced in evidence or made a part of the record in the case without denying that due process of law guaranteed in the said Amendment?

These questions are indeed substantial and present important questions needing clarification and emphasis by this Court.

This case is directly appealable under the rule of *Kedroff v. St. Nicholas Cathedral*, 344 U. S. 94 and *Hughes v. Fetter*, 341 U. S. 609. As was true in those cases, in this case it is claimed and was claimed before the Supreme Court of Ohio on application for rehearing, a state statute has been construed by the highest state court so as to offend a provision of the Constitution of the United States. In *Kedroff v. St. Nicholas Cathedral* it was claimed the New York statute as construed violated the Fourteenth Amendment and in *Hughes v. Fetter*, the claim was that the state statute as construed violated the Full Faith and Credit Clause. See also *May v. Anderson*, 345 U. S. at page 530.

Beside Appellant's claims to the right of direct appeal under the above authorities, Appellant has the right to petition for a writ of certiorari both on the grounds that the Full Faith and Credit Clause was violated by the Supreme Court of Ohio and that procedural due process of law was denied her by that Court, under Title 28, United States Code, Section 1257(3). Rather than filing a petition for certiorari in addition to appeal papers, these questions are included herein on the authority of *Prudential Ins. Co. v. Cheek*, 259 U. S. 530, 547 and *Flournoy v. Wiener*, 321 U. S. 253, 263.

The First Constitutional Question.

Unquestionably in this case the child's domicile was Louisiana, nor does the opinion of the Supreme Court of Ohio dispute it. Yet, contrary to the authorities it has construed the word "residence" as used in Section 2111.02

of the Ohio Revised Code not to mean "domicile," and by this means it refuses to recognize the decree of the only state having the jurisdiction to appoint a guardian, the state of the child's domicile, Louisiana. The child having been brought into Ohio under no valid right and having been in the United States a mere two weeks when Appellee was appointed his guardian it would certainly appear that the Court of Appeals was correct in stating he did not even have a "residence" in Cuyahoga County, Ohio, 151 N. E. 2d, 777, 781.

Until this case was decided, Section 2111.02 of the Ohio Revised Code and its predecessor statutes had always required that in order for a guardian to be appointed for a child the *child* must have a domicile in the county in Ohio of the Probate Court. See, *Lessee of John R. Maxson v. Sawyer*, 12 Ohio 195 (1843); *In Re Hampshire*, 17 O. App. 139 (1922); *In Re Guardianship of James Edward Murray*, 4 O. N. P. (N. S.) 233 (1906), affd. in 8 O. C. C. (N. S.) 498, and *In Re Clayton*, 61 Bull. 355 (1916). Such is the rule of the *Restatement of Conflict of Laws*, §§ 117, 144, 149 and 151.

As stated in § 117, entitled "Guardianship of The Person" the rule is that:

> "A state can exercise through its courts jurisdiction to determine the custody of children or to create the status of guardian of the person only if the domicil of the person placed under custody or guardianship is within the state."

See also 25 *Am. Jur.*, pp. 22-23 wherein it is said:

> "The probate court within the territorial district of which the ward has his legal domicil has primary jurisdiction to appoint the guardian. The word 'residence,' as used in statutes relating to the appointment of guardians, has been construed to mean the

domicil of the ward, and it is the prevailing view that legal domicil within the district is sufficient to confer jurisdiction; although the infant or incompetent at the time is residing elsewhere, provided, it seems, that authority to exercise such jurisdiction has been conferred by statute."

In *Commonwealth ex rel. Graham v. Graham*, 80 Atl. 2d 829, 367 Pa. 533, the Court held at page 832:

"Jurisdiction of a court in a proceeding involving custody is determined by the domicile or residence of the child. *Commonwealth ex rel. Rogers v. Daven*, 298 Pa. 416, 148 A. 524; *Commonwealth ex rel. Sage v. Sage*, 160 Pa. 399, 28 A. 863; *Commonwealth ex rel. Camp v. Camp*, 1942, 150 Pa. Super. 649, 29 A. 2d 363; *In re Rosenthal*, 103 Pa. Super. 27, 157 A. 342; *Commonwealth ex rel. Bich v. Bich*, 73 Pa. Super. 268; *State ex rel. Larson v. Larson*, 1934, 190 Minn. 489, 252 N. W. 329; Restatement, Conflict of Laws, Sections 117, 145, 146. A court which does not have jurisdiction of the child, does not have jurisdiction of the subject matter to determine the right of custody as between the parties. *Commonwealth ex rel. Rogers v. Daven, supra; Commonwealth ex rel. Camp v. Camp, supra; Gilman v. Morgan*, 158 Fla. 605, 29 So. 2d 372, certiorari denied, 331 U. S. 796, 67 S. Ct. 1740, 91 L. Ed. 1822; *Dormon v. Friendly*, 146 Fla. 732, 1 So. 2d 734; *Lake v. Lake*, 63 Wyo. 375, 182 P. 2d 824."

That such is and should be the law is required as a matter of public policy, for if any state other than that of a child's domicile in such circumstances as here, can make an award of guardianship, by an *ex parte* order with "no notice to anyone" (151 N. E. 2d at 779) and with no hearing, and this order may not be set aside as void *ab initio* and full faith and credit given to the judgment of the state of the child's domicile given pursuant to its laws, by such a construction as placed on Section 2111.02 of the Ohio Re-

vised Code, then there is nothing whatsoever to prevent the illicit trafficking in children and the abducting and surreptitiously bringing them into jurisdictions which neither they nor those closest to them have any ties.

If in such a situation the state of the child's domicile is not the one alone to decide custody of infants, we will have nothing but a riot of competing jurisdictions asserting a right of custody based on the most intangible and meretricious of claims upon which to base jurisdiction. In this case, three states appointed a guardian for this child. The first was Mississippi which acted while the child was in Europe; the second was Ohio, into which he was brought by no valid right or order and custody immediately ordered and the third was that of his domicile, Louisiana.

In such a case as this it is for this Court to choose between the competing public policies involved of Louisiana and Ohio under the Full Faith and Credit Clause. *Hughes v. Fetter*, 341 U. S. 609, 611; *Pink v. A. A. A. Highway Express*, 314 U. S. 201, 210.

The United States Supreme Court has never decided this question and it is submitted that in these days when American citizens, whether by reason of Government service or otherwise are situated with their families in places which are not their domiciles but only their temporary residences, this question is worthy of decision by this Court.

The Supreme Court of Ohio in its opinion at pages 371-372 of 168 Ohio St. held that the Full Faith and Credit Clause of the Constitution of the United States does not require that full faith and credit be given to the Louisiana decree because it was not an *in personam* judgment as to Appellee, citing *May v. Anderson*, 345 U. S. 528, and *New York ex rel. Halvey v. Halvey*, 330 U. S. 610. There are significant differences between those

cases and this one. First of all, they were both divorce cases involving the struggle between parents as to the custody of the children and the award of custody was an integral part of the divorce action in each case.

In the *Halvey* case the New York Court had all parties before it, and it was held that New York could modify the Florida decree to the same extent Florida could do so without infringing the Full Faith and Credit Clause. The question of whether in absence of personal service the Florida decree of custody had any binding effect on the husband was not decided in that case (345 U. S. page 533).

In *May v. Anderson* the elemental question was whether a court of a state where a mother is neither domiciled, resident nor present, may cut off her immediate right to the care, custody, management and companionship of her minor children without having jurisdiction over her *in personam* (345 U. S. at 533). At the time the divorce decree was obtained in Wisconsin the domicile of the mother was in Ohio (345 U. S. at 534, footnote 7) and the children were not within the jurisdiction of Wisconsin because they were living with their mother in Ohio (345 U. S. 531). Therefore, the domicile of the children was that of their mother, Ohio. As stated in footnote 7, (345 U. S. 534):

> "For the general rule that in cases of the separation of parents, apart from any award of custody of the children, the domicile of the children is that of the parent with whom they live and that only the state of that domicile may award their custody, see Restatement, Conflict of Laws (1934), Sections 32 and 146, Illustrations 1 and 2."

And as stated in part in footnote 8, same page:

> "* * * the weight of authority is in favor of confining the jurisdiction of the court in actions for di-

vorce, where the defendant is a non-resident and does not appear, and process upon the defendant is by substituted service only, to a determination of the status of the parties * * * This rule of law extends to children who are not within the jurisdiction of the court when the decree is rendered, where the defendant is not a resident of the state of the seat of the court, and has neither been personally served with process nor appeared to the action * * *."

It is evident therefore that these cases being divorce cases have no bearing on the instant case, which further emphasizes the incorrectness of the holding of the Supreme Court of Ohio (168 Ohio State, at pages 371-372), that the Full Faith and Credit Clause of the Constitution of the United States does not require that full faith and credit be given to the Louisiana decree, the domiciliary state, in the case now before this Court.

In this case the Appellee is not a parent. See Mr. Justice Frankfurter's statement in his dissent in *Vanderbilt v. Vanderbilt*, 354 U. S. 416, 424 at footnote 1 and the statement in the opinion of the Court of Appeals herein that: "In the case here being considered, it must be remembered that the controversy is not between parents" (151 N. E. 8d 777, 781). This is not a custody matter arising out of a divorce decree. Here there are two paternal aunts with at least equal claims to the child, one of whom had obtained the prior Mississippi decree, which has never been litigated in Ohio. Clearly, however, the person with the best claim to the child is, his paternal grandmother as his natural guardian, *Lehmer v. Hardy, et al.*, 294 Fed. 407.

In the instant case the award of custody to Appellee was rendered by the Probate Court of a state which was not the domiciliary state, in an *ex parte* proceeding with "no notice to anyone." The Louisiana decree was also

made without notice to others. However, it was the domiciliary state of the child and there is no question that a domiciliary court may render such a decreé under appropriate statutes. See the leading case of *State ex rel. Larson v. Larson,* 190 Minn. 489, 252 N. W. 329, and 25 *Am. Jur.* 22-23 above cited. The Louisiana decree awarding custody to Appellant was akin to a judgment *in rem.* See, *State ex rel. Larson v. Larson, supra,* at page 330 of 252 N. W., and *Naylor v. Naylor,* 143 A. 2d, 604, 609, 217 Md. 615. Louisiana having jurisdiction of its domiciliary, the child, its judgment awarding custody to Appellant is a valid judgment, and the Constitution of the United States requires Ohio to honor it, especially since the child had no tie to Ohio other than that obtained by his being transported into the state and being physically present therein.

The Supreme Court of Ohio's construction of Section 2111.02 Ohio Revised Code makes the procedure for the appointment of a guardian used in this case possible for the first time by an Ohio probate court as before this case the law of Ohio, as above stated, had required the child to have a domicile in the state. Under the Juvenile Court Act of Ohio its juvenile courts have the power to protect helpless and dependent children (Sections 2151.01 *et seq.* of the Ohio Revised Code). The statement of Mr. Justice Jackson in his dissent, joined in by Mr. Justice Reed in *May v. Anderson, supra,* page 539, is particularly apt in this case:

> "A state of the law such as this, where possession apparently is not merely nine points of the law but all of them and self help the ultimate authority, has little to commend it in legal logic or as a principle of order in a federal system."

For a recent decision to the same effect and which reviews the authorities on the subject see *Naylor v. Naylor*, *supra*, 610.

The Second Constitutional Question.

As before stated there were no facts before the Supreme Court of Ohio when it decided this case. Because no bill of exceptions signed and certified by the Judge of the Court of Appeals taking up the transcript of the evidence to the Supreme Court of Ohio, as is required by the law of Ohio was filed with that Court, that Court had no facts before it. In short it decided the case in a *vacuum*. In its opinion the Supreme Court of Ohio stated, 168 Ohio St. at page 372:

> "Since the error which is the basis of this reversal is apparent from the entry of the Court of Appeals, it is not necessary to our decision that there be a bill of exceptions. The Motion of Appellee to dismiss the appeal is therefore overruled."

Yet the journal entry of the Court of Appeals states no facts but only that Court's conclusions of law. (R. p. 19 and Appendix C hereto.)

Such a complete disregard of the statutes and decisional law of Ohio and the due administration of justice as to the necessity of a review of the facts on appeal is an arbitrary denial of the procedural due process guaranteed in the Fourteenth Amendment. For instance, this Court in *Chessman v. Teets*, 354 U. S. 156, held that the affirmance by the state supreme court of the petitioner's conviction upon a seriously disputed record could not be allowed to stand in the face of this constitutional guarantee. In that case there was at least *some* record before the state

supreme court upon which it could determine facts and render a judgment; in this case, there was *none*.

The Third Constitutional Question.

The Supreme Court of Ohio totally failed to rule on Appellant's Motion to Strike Material Extraneous and Prejudicial from Appellee's brief filed with that Court. This motion was filed September 11, 1958. It can only be assumed that that Court read this "record," the motion having been disregarded. Its disregard of this motion and the consideration of this "record" as evidence which had never been attempted to be put into evidence before the Court of Appeals, let alone properly brought up to the Supreme Court of Ohio as a part of a bill of exceptions, was greatly to Appellant's prejudice and constituted such a flagrant disregard of her constitutional rights as to make it impossible for her to have had the case fairly considered by the Supreme Court of Ohio.

As this Court pronounced in *Interstate Commerce Commission v. Louisville and Nashville Railroad Company*, 227 U. S. 88, 93:

> "* * *—for manifestly there is no hearing when the party does not know what evidence is offered or considered and is not given an opportunity to test, explain, or refute."

It is submitted that the decision of the Supreme Court of Ohio dated December 24, 1958 and its decision overruling the Appellant's Application for Rehearing dated January 14, 1959 violated the Full Faith and Credit Clause of the United States Constitution and that such decisions violated Appellant's rights guaranteed her by the Four-

teenth Amendment to said Constitution. We submit the questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted,

MAURICE F. HANNING,
J. KING ROSENDALE,
1500 Midland Building,
Cleveland 15, Ohio,
Counsel for Appellant.

MCAFEE, HANNING, NEWCOMER & HAZLETT,
1500 Midland Building,
Cleveland 15, Ohio,
Of Counsel.

APPENDIX A.

OPINION OF THE SUPREME COURT OF OHIO.

(No. 35767—Caption omitted.)

Appeal from the Court of Appeals for Cuyahoga County.

There is no substantial dispute as to the facts necessary to a determination of the question raised by this appeal. Donnie R. Fore was born in the state of Louisiana in 1922 and resided there continuously until his enlistment in the United States Army in 1941. He remained in the armed forces until his death, serving in various theaters both in this country and abroad. His last enlistment occurred on May 3, 1956, at which time he was stationed with the army in France. Immediately prior to this overseas service, he had been stationed in the state of Virginia. His wife, whom he had married in Germany in 1952, accompanied him on his last overseas assignment.

On September 7, 1957, Donnie R. Fore and his wife were killed in an automobile accident in France, leaving surviving them a son, Donald Peter Fore, now approximately three years old.

Upon receiving notice of the death of Fore and his wife, the respondent herein, sister of Mrs. Fore and maternal aunt of Donald, went to Germany for her sister's funeral. After several weeks, during which an investigation was conducted by the American Red Cross, an officer of the United States Army in Europe turned the custody of the child over to the respondent.

Upon her return to the United States with the boy, the respondent was served at the airport in New York with a copy of a petition in habeas corpus seeking the release of the boy. That proceeding was instituted in a New York court by a paternal aunt of the boy and was based on letters

of guardianship issued to her by a court in her home state of Mississippi. After hearing, the New York court, on November 25, 1957, refused to release the boy and attempted to award legal custody of hin to the respondent.

Thereupon, the respondent returned with the boy to the home maintained by her and her husband in Cleveland, Ohio. She later filed an application for letters of guardianship of the person and estate of Donald in the Probate Court of Cuyahoga County, naming as next of kin the maternal grandparents in Germany and the petitioner, Ella V. Fore, paternal grandmother, residing in Louisiana. The application was granted by the Probate Court of Cuyahoga County on December 2, 1957.

On April 11, 1958, approximately four months after the letters of guardianship were issued by the Probate Court of Cuyahoga County, an application of petitioner herein, filed in Louisiana and seeking an award of "tutorship" (guardianship) of the person of the boy, was granted.

Ten days later, on April 21, 1958, the petitioner instituted this action in habeas corpus in the Court of Appeals for Cuyahoga County. The Court of Appeals found that "the said Donald Peter Fore is illegally detained by the said Jakobine Toth in her custody by reason that the order entered on December 2, 1957, by the Probate Court of Cuyahoga County, Ohio, in Doc. 555, No. 551269, was void *ab initio* for the reason that the court did not have jurisdiction to appoint the said Jakobine Toth the guardian of the person and estate of said Donald Peter Fore and that full faith and credit is to be accorded the judgment of the Fifth District Court, Parish of Franklin, State of Louisiana, issued the 11th day of April, 1958, appointing the said applicant, Ella V. Fore, guardian of the person and estate of the said Donald Peter Fore."

The cause is before this Court as an appeal of right from the judgment of the Court of Appeals for Cuyahoga County.

There is also before this Court a motion by appellee to dismiss the appeal, on the ground that appellant has failed to file a bill of exceptions.

BELL, J. The petitioner urges that the Probate Court of Cuyahoga County lacked jurisdiction to award custody, by way of guardianship, of Donald, for the reason that at all times material to this controversy his domicil was Louisiana. To reach this conclusion she advances several "rules" of domicil. Briefly summarized, they are:

1. *A married woman takes the domicil of her husband by operation of law.*

2. *A person's domicil is not changed while he is in military service, unless he has most clearly and unequivocally shown an intent to change it.* Donnie R. Fore, the father, was admittedly domiciled in Louisiana prior to his enlistment in 1941. Since he remained in the service until his death, this principle, together with "rule" 1, ascribes to the parents of Donald a Louisiana domicil during their entire lives.

3. *An infant's domicil is that of his parents, particularly that of his father.* This domicil is thrust upon the child "by operation of law," irrespective of the place of birth, of the place of abode, or of any actual choice. Following "rules" 1, 2 and 3, we would be forced to the conclusion that Donald was domiciled in Louisiana until the moment of his father's death.

The judgment of the Court of Appeals refers to a fourth rule, operative immediately upon the death of the parents:

4. *On the death of both parents, a minor takes the domicil of his grandparents.* Since the petitioner is admittedly domiciled in Louisiana, this principle is urged upon us to declare Louisiana as the domicil of Donald.

Working with these "rules" and with the legal conclusion that the court of a minor's domicil has exclusive jurisdiction to award custody of the minor, the majority of the Court of Appeals concluded that Ohio through its courts lacked the power to determine the custody of Donald by appointing a guardian for him.

Although, as a matter of argument, such a conclusion might dispose of the question here under consideration, it could not do so without leaving some serious problems unanswered. In the first place, we are not convinced that these broad statements are given the universal application as contended by the petitioner. See Cook, The Logical and Legal Bases of the Conflict of Laws, 33 Yale Law Journal 457. But conceding that they should be accorded full validity, we are faced with these questions:

What was the domicil of the mother during the hours she survived her husband (if, in fact she did survive him)? And did her son take that domicil?

The domicil of which set of grandparents, paternal or maternal, is the child's domicil after the death of his parents?

In Stumberg, Conflict of Laws, 49, it is stated that the domicil of a child is that of his grandparents, if he in fact lives with them. See, also, *Lamar, Exr., v. Micou, Admx.*, 112 U. S., 452, 28 L. Ed., 759, 5 S. Ct., 221.

It is undisputed in this case that Donald has never lived with the petitioner.

Conceding further that "rule" 4 above is a correct statement of the general law, and that a child upon the death of his parents takes the domicil of his grandparents.

we may well ask whether a person, other than a grandparent, with whom the child "in fact lives" can change his domicil. In *Loftin v. Carden*, 203 Ala., 405, 83 So., 174, it was alleged and proved, in a controversy between two petitioners for the guardianship of a two-year-old infant, that both its parents and natural guardians were dead, and that the child had been removed into Dale County, at the time the bodies of its parents were taken there for burial, and had remained there in the custody and control of the successful petitioner up to the time of filing the petition. The court in that case said:

"In this case both the father and mother of the infant were dead, and the infant was not of sufficient age to choose a residence or domicile. The appellee in this case being the maternal aunt of the infant, and having the legal custody and control of it, could certainly choose the residence or domicile of the infant which could not choose its own, in the absence of both father or mother or other person having a better right to the custody and control of the infant. So, if it should be conceded that the residence of the infant was ever in Bullock County, the undisputed evidence shows that that residence was changed to that of Dale County when the probate court of that county assumed jurisdiction and appointed a guardian for the infant."

If the reasoning of the *Loftin* case is followed, it may well be that the domicil of Donald is in Ohio by virtue of his Cleveland home with the respondent.

However, we do not believe that the welfare of a child turns on such verbalisms. Unless compelled by some Ohio statute to find to the contrary, we are of the opinion that the Ohio court had the inherent jurisdiction to determine the custody of Donald, irrespective of his domicil. An award of custody is not simply an adjudication of personal rights of individuals in and to a minor; it is a conclusion of

what is best for the welfare of the child. See Stumberg, The Status of Children in the Conflict of Laws, 8 University of Chicago Law Review, 42, 55, where it is said:

"Custody proceedings do not have as their purpose creation or recognition of an aggregate of legal relations, but rather a judicial determination of conflicting claims to the physical control and care of the child. These claims would normally be incidents of the parent-child relationship, and under ordinary circumstances there would be no occasion at all for their assertion in court. It is when the circumstances become abnormal, as where the parents are separated, or there is a divorce, or the parents are allegedly unfit, or are dead, that a situation for judicial cognizance arises. If the case were merely one for determining the merits of the conflicting claims as between the immediate parties, there would be no particular reason for departing from usual concepts of jurisdiction in personam; but the very abnormality of the situation brings into play the further idea that in making his decision, the trial judge should be guided not so much by legalistic formulae as by considerations which have a bearing upon the ultimate interests of the child. Actuated by this thought, a number of courts have held that the interests of the child can be adequately protected at the place where it actually resides and that jurisdiction exists there even though that place may not be the child's technical domicil."

Viewed thus, jurisdiction to reach this conclusion rests on the sovereignty which each state has in standing *in parens patriae* toward children within its borders. This jurisdiction should not be abdicated simply because such a child has a technical domicil in some other state.

Perhaps at one time in the history of this country—before the days of easy and fast transportation—the domi-

ciliary court was the one best suited to determine custody. *Lanning v. Gregory* (1902) 100 Tex., 310. 99 S. W., 542. It was in the domiciliary state that a family lived, grew and died. It was in that state that the child's interests were centered. However, domicil was then the basis of jurisdiction, not because of anything inherent in the word, but because it was the easiest way to describe the state which was closely connected with the welfare of the child.

Such is not necessarily the situation today. Easy modes of transportation and a plentitude of jobs have divided families among several states. Domicil no longer retains its original impact. In custody cases, courts now recognize that the domiciliary court does not have *sole* jurisdiction, and many older precedents have been overruled. Thus in *Wick v. Cox* (1948), 146 Tex., 489, 208 S. W. (2d), 876, the court held:

"The principle underlying jurisdiction of the subject matter in child custody cases is the welfare of society, primarily as evidenced by the welfare of the child, but involving also the right, and, for that matter, the duty, of a state, being the relatively independent sovereign that it is, to look after the welfare of individuals within its borders * * *."

Part of the genius of the law is that old "rules" give way to new ones which better reflect the basic principles which undergirded the former. The basic principle in custody cases is that the state seeking to exercise such jurisdiction must be so closely connected with the welfare of the child that it is in furtherance of *his* interests that his custody be determined in that state. Obviously, such state may be far beyond an assigned domicil.

Applying this basic principle to the case before us, it becomes clear that Ohio's interest is sufficient to uphold its exercise of jurisdiction. The only connection between

Donald and Louisiana rests on a tenuous and a technical idea of domicil. His connections with Ohio, however, are those flowing from an actual residence within Cuyahoga County. We are of the opinion that this residence was sufficient to give Ohio the inherent power to decide the question of Donald's custody.

In *Finlay v. Finlay*, 240 N. Y. 429, 148 N. E., 624, 40 A. L. R., 937, Judge Cardozo said:

"The jurisdiction of a state to regulate the custody of infants found within its territory does not depend upon the domicile of the parents. It has its origin in the protection that is due to the incompetent or helpless. * * * [Cases cited.] For this, the residence of the child suffices, though the domicile be elsewhere * * *".

Indeed, the majority of American cases appear to go further and tend to support jurisdiction if the child is, in fact, *present* within the state. Thus it is said in 4 A. L. R. (2d), 16:

"Where there is no outstanding judicial award of custody by a foreign court the courts are nearly unanimous in holding that even though the children may be domiciled without the state, power in the court exists to make an award of custody of children present in the state in furtherance of the welfare of the children."

However, the facts of the instant case do not require us to go so far.

We do not, of course, suggest that the location of the child's domicil is unimportant in deciding the merits of a custody case. Indeed it may be of prime importance in a decision as to which of two competing persons is to be granted the custody. However, these considerations go to the *merits* of the case and not to *jurisdiction*, which was the basis of the Court of Appeals judgment.

A case very similar in its facts to the present one is *People, ex rel. Noonan, v. Wingate*, 376 Ill., 244, 33 N. E. (2d), 467. There a habeas corpus action was brought in Illinois by the paternal grandmother to obtain custody of a minor from residents of Illinois who had been caring for the minor. Both parents were deceased, the mother having died first. At the time of his death, the father was domiciled in Massachusetts even though he was working in Georgia. The grandmother, who also was domiciled in Massachusetts, was appointed guardian by a Massachusetts court. In the habeas corpus action the grandmother contended that the child was domiciled in Massachusetts, and that that state alone had jurisdiction to determine custody. In disposing of this claim, the Supreme Court of Illinois said:

"The jurisdiction of a state to regulate the custody of infants within its territory does not depend upon the domicile of the child. It arises out of the power that every sovereignty possesses as *parens patriae* to every child within its borders to determine its status and custody that will best meet its needs and wants. * * * The residence within the state suffices even though domicile may be in another jurisdiction."

For similar rulings in other states, see *Stearns, Admr., v. Allen*, 183 Mass., 404, 67 N. E., 349, 97 Am. St. Rep., 441; *Rizo v. Burruel*, 23 Ariz., 137, 202 P., 234, 19 A. L. R., 823; *Taylor v. Collins*, 172 Ark., 541, 289 S. W., 466; *Appeal of Woodward*, 81 Conn., 152, 70 A., 453; *Hopkins v. Gifford*, 309 Ill., 363, 141 N. E., 178; *Kenner v. Kenner*, 139 Tenn., 211, 201 S. W., 779, L. R. A. 1918E, 587; *Sheehy v. Sheehy*, 88 N. H., 223, 186 A., 1, 107 A. L. R., 635; *White v. White*, 77 N. H., 26, 86 A., 353; *Goldsmith v. Salkey* (Tex. Civ. App.), 115 S. W. (2d), 778.

The foregoing authorities establish only that Ohio has the inherent authority to decide the question of custody. To the extent that the statute law has limited that authority, we must, of course, follow the mandate of the Legislature. Petitioner relies on Section 2111.02, Revised Code, for such a limitation. That section, so far as pertinent herein, provides as follows:

"When found necessary, the Probate Court on its own motion or an application by any interested party shall appoint a guardian of the person, the estate, or both, of a minor, incompetent, habitual drunkard, idiot, imbecil, or lunatic or a guardian of the estate of a confined person; provided the person for whom the guardian is to be appointed is a resident of the county or has a legal settlement therein."

It is urged by the petitioner that the word, "resident," should be interpreted as synonymous with "domicil," and that in Ohio the Probate Court can not appoint a guardian for a person not domiciled in Ohio unless he has a "legal settlement" in Ohio.

We do not ascribe this meaning to the word, "resident," as it is used in this section. Rather, we believe it is to be given its ordinary meaning, that of indicating simply a place of dwelling within the state. We recognize that "residence" is often interpreted as the equivalent of "domicil." See Reese and Green, That Elusive Word, "Residence," 6 Vanderbilt Law Review, 561. Such an interpretation here, however, would unnecessarily restrict the power of our Probate Court to deal with minor children. It would result in some instances in depriving the court of the power to determine custody of a child who has no family in another state and who has his only settled connection in Ohio—deprive it of the power simply be-

cause the surviving parent died domiciled some place other than Ohio. We do not believe that the General Assembly had any such intention when it enacted Section 2111.02.

This interpretation of the word is supported when we note the other persons to whom this section applies—the "incompetent, habitual drunkard, idiot, imbecile, or lunatic." Interpreting "residence" as the equivalent of "domicil" would prevent our courts from appointing a guardian of such a person, even though he was present and living in Ohio if the technical rules of domicil happened to make another state his domicil.

The final claim of the petitioner is that the Full Faith and Credit Clause of the Constitution of the United States (Section 1, Article IV) requires us to give such credit to the Louisiana decree of "tutorship" as will preclude us from giving any effect to the order of the Probate Court of Cuyahoga County. The Louisiana decree was entered without jurisdiction over the person of the respondent or the child. We are, therefore, not required to give such effect to that decree as to require the respondent to deliver the child to the petitioner. This is the philosophy underlying *May v. Anderson*, 345 U. S., 528, 97 L. Ed., 1221, 73 S. Ct., 840. See, also, *Cunningham v. Cunningham*, 166 Ohio St., 203, 141 N. E. (2d), 172; *New York, ex rel. Halvey, v. Halvey*, 330 U. S., 610, 91 L. Ed., 1133, 67 S. Ct., 903.

Our conclusion from the foregoing is that the Probate Court of Cuyahoga County did have jurisdiction to enter its decree of guardianship, and that the Full Faith and Credit Clause of the United States Constitution does not preclude our giving effect to that decree. It follows that such jurisdiction of the Probate Court is plenary and ex-

clusive. *Shroyer, Gdn., v. Richmond,* 16 Ohio St., 455; *In re Clendenning,* 145 Ohio St., 82, 60 N. E. (2d), 676.

The judgment of the Court of Appeals is, therefore, reversed and final judgment rendered for the respondent.

Since the error which is the basis of this reversal is apparent from the entry of the Court of Appeals, it is not necessary to our decision that there be a bill of exceptions. The motion of appellee to dismiss the appeal is, therefore, overruled.

Judgment reversed.

DECISION OF THE SUPREME COURT OF OHIO OVERRULING APPLICATION FOR REHEARING.

35767. *In re Donald Peter Fore, a minor*: *Ella V. Fore, Appellee v. Jakobine Toth, Appellant.* Cuyahoga County. Rehearing denied.

DECISION OF THE COURT OF APPEALS.

(No. 24536—Caption omitted.)

By Skeel, *PJ.*

This is an action invoking the original jurisdiction of the court wherein a petition has been filed seeking a writ of Habeas Corpus for the immediate release of Donald Peter Fore to the custody of the relator. The facts are not in serious dispute. The relator is the paternal grandmother of Donald Peter Fore, a minor of three years of age. She is a resident of Winnsboro, Louisiana. She is seventy-seven

years of age. The respondent is now, and has been since her marriage to William Toth in 1954, a resident of Cleveland. She is a citizen of Germany and has not yet petitioned for United States citizenship. Donald Peter Fore is the son of Donnie Ray Fore and Franziska Anna Fore, now deceased, both parents having died in a common accident in Ingrandes, France, September 7, 1957. The respondent is the sister of Franziska Anna Fore.

Donnie Ray Fore was born in Winnsboro, Louisiana, December 19, 1922. He enlisted in the Army of the United States on July 8, 1941, and was continuously in the Military Service from that time until his death. His last enlistment was on May 3, 1956. The place of this enlistment, as indicated by the military records, was Ingrandes, France, where he was then stationed. In this enlistment, as in all previous enlistments, he gave his home address as Winnsboro, Louisiana. Donnie Ray Fore, during his military service, attained the rank of Master Sergeant and at the time of his death on September 7, 1957, was serving in the Quartermaster's Depot, Ingrandes, France. Sergeant Donnie Ray Fore was married in Goeggingen, Germany, August 6, 1952. Donald Peter Fore was born in the Military Hospital at Fort Lee, Virginia, on October 10, 1954.

Immediately after the death of Sergeant Donnie Ray Fore and his wife, Donald Peter Fore was cared for by the family of Master Sergeant Gross until October 24, 1957, when the respondent, who had flown to Germany after receiving notice of her sister's death on September 14, 1957 (notice having been received from Mrs. W. C. Lee, sister of Donnie Ray Fore, who lived in Louisville, Mississippi), took possession of the child from an army officer. The respondent was then at the home of her parents in Germany.

After the respondent obtained possession of the infant, Donald Peter Fore, from the army representative, she

brought him to the United States on November 18, 1957. Upon arrival in New York, she was served with a petition seeking a writ of Habeas Corpus for the release of the infant. This proceeding was instituted there by Ida Fore Tillery, a resident of Mississippi and who was a paternal aunt of Donald Peter Fore. The record shows that the writ was denied on November 25, 1957.

The respondent then brought Donald Peter Fore to Cleveland, Ohio, where he has since been maintained in her household.

On December 2, 1957, the respondent filed an application for letters of guardianship, alleging that the parents of Donald Peter Fore, aged three, October 10, 1957, residing at 9006 Laisy Avenue, Cleveland, Ohio, were deceased, and naming the maternal grandparents in Germany and this relator, Ella Fore, paternal grandparent, residing in Louisiana, as next of kin. The application shows that the applicant (respondent here) is the maternal aunt and that the minor's property consists of government insurance on the life of the deceased father. This application was granted forthwith without notice to anyone and letters of guardianship issued upon posting a bond in the sum of $4,000. The probate file discloses a letter from a lawyer in Germany, employed by respondent to assist her in getting possession of the child, advising immediate action in securing an order of guardianship in the Probate Court of the respondent's residence, which letter included a copy of the journal of the Supreme Court of New York, County of Queens, dismissing the application for a writ of Habeas Corpus.

On April 11, 1958, the relator filed a petition in the Fifth District Court, Parish of Franklin, Louisiana, seeking an order of "tutorship" of the person of Donald Peter Fore and the right to the effects of said minor under the

Law of Louisiana. The petition sets out that Ella Vernon Fore (relator herein) is a resident of the Parish of Franklin, State of Louisiana; that she is the mother of Donald (Donnie) Ray Fore, the father of the minor here concerned; that the father and mother of said minor died in a common accident in France where the father was serving as a member of the Army of the United States; that he had been a member of the Armed Forces of the United States since 1941; that his home and domicile when he entered the Armed Services was the Parish of Franklin, Louisiana, where it has remained ever since and until his death, and that the domicile of the minor continued after the death of his parents in the Parish of Franklin and State of Louisiana.

Some reference in this petition is made to the fact that after being consulted by the Army concerning the child after the death of its parents, she consented to an application being made by Ida Fore Tillery, a sister of the deceased, Donald Ray Fore, to seek guardianship of such minor, which application was filed October 18, 1957, in the Fourth Chancery District Court of Mississippi, and decree entered by that court appointing Ida Fore Tillery Guardian. It is also set out in said petition that on October 25, 1957, the United States Army wrongfully delivered physical possession of Donald Peter Fore to the respondent who was then in Germany and that she brought said infant to Cleveland, Ohio, where she now has physical possession of such child and wrongfully refuses to deliver the child to the petitioner.

Upon hearing of the relator's petition for "tutorship" on April 11, 1958, the court appointed Ella Vernon Fore, guardian of said minor, Donald Peter Fore, as is shown by the record of such proceedings introduced in evidence in this case.

From the evidence, there can be no question but that the domicile of Donnie Ray Fore was Winnsboro, Parish of Franklin, Louisiana, during his entire life. This was his domicile when he enlisted in the United States Army and there is no evidence that he, at any time during his sixteen years of service prior to his death, ever signified an intent to change such domicile.

In Vol. 18, page 171, Sec. 17 *O. Jur.* 2d, under the title "Domicile" it is said:

> "* * * Absence from home for years, where at the time of leaving there was an intention to return, does not, unless in the meanwhile that intention was destroyed by some unequivocal act signifying a purpose to change the domicile, defeat one's right to claim his former residence as if it had never been interrupted by his absence. On no other principle could there be secured to officers in the Army and Navy on duty, public officials abroad and travelers in foreign parts, the right to enjoy on their return the privilege of voting where they had always resided or to claim the protection of their property from unlawful seizure in their absence. * * *"

In the case of *Glassman v. Glassman*, 75 Oh. Ap. 47, 60 N. E. 2d 716, the court said in the second paragraph of the syllabus:

> "2. The domicile of a person entering the armed forces of the United States remains the same throughout service in such forces unless a new domicile is voluntarily selected by such person."

On the facts of the case just cited, the rule set forth in paragraph four of the syllabus is not applicable here. The general rule is that where the husband has a fixed domicile recognized as such, the wife's domicile is that of her husband.

The facts are very clear that the respondent set out while still in Germany to keep Donald Peter Fore as her child regardless of the wishes of other members of the family, even as to those who under the law of the state of the child's domicile would have a prior right to such protective custody. The child's domicile was unquestionably in the Parish of Franklin, Louisiana, U. S. A., at the time of and since the death of his parents which occurred in a common accident while his father was in the Armed Services. This is true for two reasons, first because a minor's domicile is that of his father and second because courts hold that an infant takes the domicile of his paternal grandparents upon the death of both parents. See *Lehmer v. Hardy, et al.*, 294 Fed. 407.

The claim that the court is acting on behalf of the State of Ohio as "parens patriae" *under which theory* mere residence of the child within the state would suffice to give the judge jurisdiction to adjudicate what is for the best interests of the child is not applicable here. The respondent brought the child here seeking the protection of this state in her attempt to keep the exclusive custody of the child for her own purposes. There has been as yet no contest as to what is for the best interests of the child, nor could such question be litigated in this state on the undisputed facts here presented. Does the respondent suggest that the state of the child's domicile, Louisiana, is incapable of seeing to its welfare? Does the respondent seek, should disaster again strike, to burden this state with the continued care of the child or would she then attempt to surrender his custody to the state of his domicile? The suggestion that the relator, being seventy-seven years of age, is incapable of caring for the child, is not supported by the record in this case. The facts are that Ella Fore has raised nine

children and one grandchild, some of whom have had very acceptable army careers.

In 4 *A. L. R.* 2d, beginning at page 7, is an annotation to the case of *Wicks v. Cox*, 208 S. W. 2d 876. On page 14 in dealing directly with the question here presented, it is said:

> "Another theory which guides the courts' thinking is that a custody award affects the status of the child—a permanent relationship, jurisdiction over which is in the court of the state of the child's domicil, and in that court only. Courts for support of this theory often cite and quote 2 Beale, Conflict of Laws, para. 144.3, where it is said: 'Since custody of a child by one parent carries with it domicil and a domestic status, jurisdiction to give the child to one parent or the other depends in principle on the domicil of the child; and a state which is the temporary residence of the child, not the domicil, cannot confer the right to custody. A fortiori a decree for custody rendered in a state where the child is neither resident nor domiciled is void for lack of jurisdiction.' This view is supported in the American Law Institute, Restatement, Conflict of Laws, para. 117 and 145-148. Theoretically, it would seem that the court of the child's domicil should have power to determine its custody, since that sovereign is especially interested in the child's welfare. 24 Harv. L. Rev. 142."

In the case here being considered, it must be remembered that the controversy is not between parents. As is indicated in the annotation just cited, many times in disputes between husband and wife or in protecting an abandoned child, residence is sufficient to vest a court with jurisdiction. The legal right to the custody or the responsibility for the support and care of Donald Peter Fore as between the remaining members of his family has never been the subject of an action before a court of competent jurisdiction. The respondent just took the child without legal right or

authority and with total indifference to all others equally entitled or with prior right to be considered in a proper action to be adjudged the guardian of such minor child.

The statute of Ohio authorizing the appointment of guardians is §.2111.02 R. C. This section circumscribes the authority of the courts of this state in making such appointment to cases where the ward is "a resident of the county or has a legal settlement therein." There is no claim here that Donald Peter Fore had a "legal settlement" in Cuyahoga County nor do the facts justify a determination that he was, when the action was commenced, a resident of this state. The respondent had no authority to establish a residence here for such minor. In the case entitled *In the Matter of the Petition for the Appointment of a General Guardian of Maude and Mabel Hubbard, Infants*, 82 N. Y. 90, the court said in the headnotes:

> "The Supreme Court has no jurisdiction to appoint a guardian for an infant where the infant is not within the jurisdiction, or domiciled there, and has no property therein.
>
> "It seems, that if an infant is a resident within the jurisdiction, although not domiciled and having no property there, the court has power to appoint a guardian; so, also, property gives jurisdiction to appoint a guardian thereof, although the infant is out of the jurisdiction and a resident abroad.
>
> "The bringing of an infant, however, into this State by stratagem for the purpose of giving jurisdiction, will not avail.
>
> "On application for the appointment of a guardian for two infants, it appeared that the legal domicile of their father was in Rhode Island. One of them was, at the time of the application, in that State, and the other had been, a few days prior to that time, secretly taken without the knowledge of her father or her relatives from Rhode Island, and brought into this State

for the purpose of bringing her within the jurisdiction of the court, and in aid of the proceedings. Neither of the infants had any property in this State. The Special Term appointed a guardian residing in this State; the General Term, on appeal, reversed the order and appointed a resident of Rhode Island as guardian. Held, that both appointments were erroneous; that the legal domicile of the infants was in Rhode Island, as the domicile of the father was the domicile of his infant children; and that the Supreme Court had no jurisdiction."

And in the case of *Lehmer v. Hardy, et al.*, 294 Fed. 407, it is said in the headnotes:

"1. Where the maternal and the paternal grandparents of a minor, whose parents had been killed, resided in New York, a decree of the Supreme Court of the District of Columbia purporting, under Code D. C. § 150, to appoint a guardian of such minor's person rendered in her absence without notice, held void, though the District of Columbia had been the domicile of her parents.

"2. Upon the death of a minor's parents, the paternal grandfather becomes her natural guardian, and by virtue of the fact that he then stands in loco parentis he has the right to change or fix the minor's domicile.

"3. A minor, like any other person, is entitled to the protection of the laws of the state or territory in which he abides."

and on page 411, the court said:

"3. Let that be as it may, however, we are quite convinced that the courts of the District of Columbia have no authority to appoint guardians of the persons of infants who do not reside and are not domiciled within their territorial jurisdiction. A minor, like any other person, is entitled to the protection of the laws of the state or territory in which he abides, and it

seems to be well-settled that only the courts of the domicile have jurisdiction to appoint a guardian of the person of a minor. Wharton on Conflict of Laws, 259; Harding v. Weld, 128 Mass. 590, 591; In re Benton, 92 Iowa, 202, 60 N. W. 614, 54 Am. St. Rep. 546; In the Matter of Hubbard, 82 N. Y. 90; Lamar v. Micou, 112 U. S. 470, 5 Sup. Ct. 221, 28 L. Ed. 751."

In the case of *Shorter v. Williams*, 74 Ga. 539, the syllabus provides:

"Where application was made for the guardianship of certain minors in the county where their father had lived and died, and where they were then domiciled, the court of ordinary thereby acquired jurisdiction to hear, determine and grant letters of guardianship for their persons and property; and this jurisdiction could not be divested or rendered nugatory by the removal of the minors to the state of Alabama by their sister, and the grant of letters of guardianship to another by the probate court of that state, pending the application in Georgia."

See also *Munday v. Baldwin*, 79 Ky. 121.

The many cases on this subject, while not based on identical facts as are here presented, hold under similar circumstances that the domicile of an infant is that of its parents; that upon the death of both parents, the paternal grandfather, or if not living the paternal grandmother, becomes the natural guardian of a minor child; that such natural guardian has the power on the death of both parents to change the domicile of a minor grandchild to that of his own, and a court of another jurisdiction has no power to oust the prior right of the court of the domicile of the infant thus situated from determining what is for the child's best interest and appointing a fiduciary of the infant's person and estate. Nor can the court of another jurisdiction take away the right of the paternal grand-

parent who, upon the death of both parents, stands in loco parentis to such child.

Here both parents were killed in a common accident in France only a very short time before the proceedings herein were commenced. The respondent got possession of the infant in Germany from an army officer. She is a maternal aunt. There are also two paternal aunts of equal standing in the United States, one being the relator in the unsuccessful proceeding in Habeas Corpus filed in New York when the child arrived in this country in the possession of the respondent, and who had an order of guardianship for the minor issued in a proceeding in the courts of Mississippi prior to the New York case. The dismissal of the petition for a writ of habeas corpus in the New York case (although the record is silent on the question) could have been for the same reason that the respondent should not prevail here. That is, the authority depended on as the basis for seeking custody was not from the state of the child's domicile. The person nearest in consanguinity in the United States is the relator in this action. She is the paternal grandmother and a resident of, and holds a decree granting her the right of "Tutorship" of the child from the courts of the Parish and State of his domicile. Such court is the only judicial tribunal authorized to determine, under the facts in this case, the right of the custody of Donald Peter Fore.

From the foregoing facts, it is clear that the custodial order of the Probate Court of Cuyahoga County depended on by the respondent was void when made for want of jurisdiction of the cause of action and of no legal effect and the writ here prayed for should issue.

APPENDIX B.

OHIO REVISED CODE SECTION 2111.02.

§ 2111.02. Appointment of guardian.

When found necessary, the probate court on its own motion or an application by any interested party shall appoint a guardian of the person, the estate, or both, of a minor, incompetent, habitual drunkard, idiot, imbecile, or lunatic or a guardian of the estate of a confined person; provided the person for whom the guardian is to be appointed is a resident of the county or has a legal settlement therein.

If a person is incompetent due to physical disability, the consent of the incompetent must first be obtained before the appointment of a guardian for him.

The guardian of an incompetent, habitual drunkard, idiot, imbecile, lunatic, or confined person, by virtue of such appointment shall be the guardian of the minor children of his ward, unless the court appoints some other person as their guardian.

When the primary purpose of the appointment of a guardian is, or was, the collection, disbursement, or administering of moneys awarded by the veterans administration to the ward, or assets derived therefrom, no court costs shall be charged in the proceeding for the appointment or in any subsequent proceedings made in pursuance of the appointment, unless the value of the estate, including the moneys then due under the veterans administration award, exceeds one thousand five hundred dollars.

Page's Ohio Revised Code.

APPENDIX C.

JUDGMENTS OF THE SUPREME COURT OF OHIO.

Wednesday, December 24, 1958

Journal 42, Page 735

Motion by Appellee to dismiss appeal. Cuyahoga County.

It is ordered by the Court that this motion be, and the same hereby is, overruled.

Wednesday, December 24, 1958

Journal 42, Page 741

Appeal from the Court of Appeals of Cuyahoga County.

This cause came on to be heard upon the transcript of the Record of the Court of Appeals of Cuyahoga County, and was argued by counsel. On consideration whereof, it is ordered and adjudged by this Court, that the judgment of the said Court of Appeals be, and the same hereby is, reversed for the reasons stated in the opinion filed herein; and final judgment is rendered for respondent.

It is further ordered and adjudged that appellant recover from appellee her costs expended in this Court and in the Court of Appeals taxed at $ _____.

Ordered, That a special mandate be sent to the Court of Appeals of Cuyahoga County, to carry this judgment into Execution.

Wednesday, January 14, 1959

Journal 43, Page 11

Application for Rehearing.

Upon consideration of the above application for re-hearing, it is ordered by the Court that rehearing be, and the same hereby is, denied.

JUDGMENT OF THE COURT OF APPEALS.

(No. 24536—caption omitted.)

This cause coming before this Court for hearing upon a writ habeas corpus directed upon the application of Ella V. Fore, for the body of Donald Peter Fore, a minor, aged three years, and thereupon, the proofs and allegations of the parties being heard and considered, a transcript of testimony taken before a Master Commissioner appointed by this Court and the Memoranda of Law submitted by the parties hereto, the Court finds that the said Donald Peter Fore is illegally detained by the said Jakobine Toth in her custody by reason that the order entered on December 2, 1957 by the Probate Court of Cuyahoga County, Ohio in Doc. 555, No. 551269 was void *ab initio* for the reason that the Court did not have jurisdiction to appoint the said Jakobine Toth the guardian of the person and estate of said Donald Peter Fore and that full faith and credit is to be accorded the judgment of the Fifth District Court, Parish of Franklin, State of Louisiana, issued the 11th day of April, 1958 appointing the said applicant, Ella V. Fore, guardian of the person and estate of the said Donald Peter Fore.

It is therefore ORDERED that the said Donald Peter Fore be and hereby is discharged from the custody of the said Jakobine Toth, and that the said Donald Peter Fore be and hereby is given to the custody of his true and lawful guardian under the laws of the State of Louisiana, Ella V. Fore.

It is further ORDERED and DECREED that the said Jakobine Toth deliver forthwith the possession of the body of the said child to Ella V. Fore, or one of her attorneys of record in this matter, and pay to or turn over to the said Ella V. Fore, as the lawful guardian of the said Donald

Peter Fore, all moneys, documents, funds, claims, papers, insurance policies, chattels and property of every kind and description which she acquired or may acquire or has asserted any right, title or interest in or to as the purported guardian of such child, and that she revoke any powers of attorney or other instruments executed by her as such purported guardian, and account to Ella V. Fore for any moneys expended by her accruing to her as such purported guardian.

Costs to Respondent, Jakobine Toth.

FILE COPY

Office-Supr... Ct.
FILED
MAR 2...
JAMES R. BR... CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1958.

No. 740

ELLA V FORE,
Appellant,

v.

JAKOBINE TOTH,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO

MOTION TO DISMISS OR AFFIRM.

CHARLES C. REDMOND,
719 National City Bank Bldg.,
Cleveland 14, Ohio,
Attorney for Appellee.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 1-5947

TABLE OF CONTENTS.

Motion to Dismiss or Affirm 1

Statement of the Case 2

The Federal Questions Sought to be Raised Have Been Expressly Passed on 4

Federal Questions Sought to be Raised Are Not Substantial 11

APPENDICES:

A. Ohio Revised Code Section 2151.06 13

B. Ohio Revised Code Section 2321.12 13

C. Appellee's Brief Filed in Ohio Supreme Court 14

TABLE OF AUTHORITIES.

Cases.

Bailey v. Progressive Motor Sales, 101 Ohio App. 173, 138 N. E. 2d 433 9

Black v. Black (1924), 110 O. S. 392, 144 N. E. 268 8

Byrd v. Engles, 76 Ohio Law Abs. 355 9

Central National Bank v. Newton Steel, 61 Ohio App. 57, 22 N. E. 2d 428 9

Clendening, In re, 145 Ohio St. 82, 16 N. E. 2d 676 4

Commonwealth ex rel. Rogers v. Daven, et al. (1930), 298 Pa. 416, 148 A. 524 8

Cunningham v. Cunningham, 166 Ohio St. 203, 141 N. E. 2d 172 7

Dix v. Martin, 171 Mo. App. 266, 157 S. W. 133 5

Estin v. Estin (1948), 334 U. S. 541, 1 A. L. R. 2d 1412 8

Finlay v. Finlay, 240 N. Y. 429, 148 N. E. 624 6

Gilman v. Morgan (1947), 158 Fla. 605, 29 S. 2d 372 8

Goldsmith v. Salkey (Tex. Civ. App.) 115 S. W. 2d 778 6

Graham v. Graham et al. (1951), 367 Pa. 553, 80 A. 2d 829 8

Hopkins v. Gifford, 309 Ill. 363, 141 N. E. 178 6

Kenner v. Kenner, 139 Tenn. 211, 201 S. W. 779, L. R. A. 1918E, 587 6

Kline v. Kline, 57 Iowa 386, 10 N. W. 825 8

Kransky v. Glen Alden Coal Co., 354 Pa. 425, 42 A. 2d 645 5

Langan v. Kessinger, 23 Ohio Law Abs. 392 6

Layerly v. United States, 162 Fed. 2d 79 5

May v. Anderson, 345 U. S. 528, 97 L. Ed. 1221, 73 Sup. Ct. 840 7, 12

Murray, In re, 4 O. N. P. (N. S.) 233; 168 Ohio St. 363, Vol. 31 *Ohio Bar* dated December 29, 1958 6

New York ex rel. Halvey v. Halvey, 330 U. S. 610 7, 12

Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565 7, 12

People ex rel. Noonan v. Wingate, 376 Ill. 244, 33 N. E. 2d 467 6

Rizo v. Burruel, 23 Ariz. 137, 202 P. 234, 19 A. L. R. 823 6

Schwartz v. Sandusky City Savings & Loan, 65 Ohio App. 437, 30 N. E. 2d 556 9

Sheehy v. Sheehy, 88 N. H. 223, 186 A. 1, 107 A. L. R. 635 6

Shroyer, Grdn. v. Richmond, 16 Ohio St. 455 4

Stearns, Admr. v. Allen, 183 Mass. 404, 67 N. E. 349, 97 Am. St. Rep. 441 6

Sutton v. Menges, 186 Va. 805, 44 S. E. 2d 414 5

Taylor v. Collins, 172 Ark. 541, 289 S. W. 466 6

Univis Lens v. U. E. W., 85 Ohio App. 55, 86 N. E. 2d 802 9

White v. White, 77 N. H. 26, 86 A. 353 6

Wick v. Cox (1948) 146 Texas 489, 208 S. W. 2d 876 6

Woodward, Appeal of, 81 Conn. 152, 70 A. 453 6

Texts.

4 A. L. R. 2d, p. 16 6

Corpus Juris Secundum, Parent and Child, Section 71, notes 60, 61 and 62 5

Constitution.

Constitution of the United States:

Art. IV, Sec. 1 4

Fourteenth Amendment, Sec. 1 8, 10

Statutes.

Ohio Revised Code:

Sec. 2111.02 6

Sec. 2151.06 5, 6, 13

Sec. 2321.12 9, 10, 13

In the Supreme Court of the United States

OCTOBER TERM, 1958.

No. 740

ELLA V. FORE,
Appellant,

v.

JAKOBINE TOTH,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO

MOTION TO DISMISS OR AFFIRM.

Now comes Jakobine Toth, the Appellee, and pursuant to Rule 16 of the Revised Rules of the Court, moves that the Court dismiss this Appeal upon the following grounds:

1. The Appeal is not within the jurisdiction of this Court.

2. The Appeal does not present a substantial Federal question.

3. The Federal question sought to be raised has been expressly passed on.

4. The judgment sought to be appealed rests upon an adequate nonfederal basis.

STATEMENT OF THE CASE

Ella V. Fore, the Appellant herein, is 78 years of age, lives alone in Winnsboro, Louisiana, and is in poor health (R. 18-22-23). She has no relatives that live near and her sole means of livelihood is a government allotment in the amount of Sixty Dollars ($60.00) per month and a gratuity from her daughter in the amount of One Hundred Dollars ($100.00) per month (R. 21-22). The Appellee, Jakobine Toth, age 33 years, is married, in good health, and lives with her husband in Cleveland, Ohio, in a home owned by them. She is the child's maternal aunt. In addition to the child, Donald Peter Fore, who is the subject of this action, Mrs. Toth and her husband are the natural parents of another child, a boy now three years of age (R. 57-59).

On September 10, 1957, the Appellee's sister and brother-in-law, Mr. and Mrs. Donnie Fore, were killed in an automobile crash in Ingrandes, France, leaving as their sole survivor their only son, Donald Peter Fore, aged three years. Mrs. Fore survived her husband for a period of five hours (R. 70-72). Subject child's father, Donnie Fore, lived with his parents in Louisiana until he entered the United States Military Service in 1941. From that time to the date of his death, he had been in the United States Military Service stationed for the most part in Europe (R. 159-160). He owned no property in Louisiana (R. 32). The mother of subject child was born and raised in Germany and was married to her husband, Donnie Fore, in 1952. Excepting for a period of three years from 1952 to 1956 when she and her husband and subject child were living in Colonial Heights, Virginia, they had spent all their married life with their child in Europe (R. 34). The child's parents stored their furniture in Virginia in 1956 when they returned to Europe for Donnie Fore's further assignment in the military service. He had ex-

pressed his desire and intention, to others, of making his home in Virginia when his last term of enlistment in the United States Military Service was ended (R. 164-166). After their death, their sole surviving child, Donald Peter Fore, was orphaned and homeless in a strange land. The Appellee, his maternal aunt, immediately flew over to Europe to get him and was successful in obtaining his release to her custody from the United States military authorities in France on October 25, 1957 (R. 73-74). Thereafter, she and subject child stayed at her parents' home in Germany for an additional three weeks, and then departed for her home in Cleveland, Ohio (R. 74). When they arrived in New York en route to Appellee's home, she was required to answer to a petition for writ of habeas corpus, on November 19, 1957, filed in the Supreme Court of New York, Queens County, by one Ida Fore Tillery, a paternal aunt, of Amite, Mississippi, who had previously obtained letters of guardianship from a Mississippi court (R. 77-79). After the hearing in the New York court, the orphaned minor and the Appellee proceeded to her home in Cleveland. On November 25th, the New York Supreme Court denied the writ and awarded legal custody of the child to the Appellee (see Respondent's Exhibit 3) (R. 78-79).

He has lived with Appellee and has been maintained and cared for by her since October 25, 1957, up until the present date, and on December 2, 1957, pursuant to application properly filed, the Probate Court of Cuyahoga County, Ohio, wherein the Appellee was domiciled and the child was residing, granted letters of guardianship awarding the custory of subject child to this Appellee (R. 85).

Pursuant to application for letters of guardianship (tutorship) filed in April, 1958, the Appellant was

awarded guardianship custody of subject child on April 11, 1958, by a Louisiana court (R. 32). Neither the minor child, Donald Peter Fore, nor his mother have ever lived in Louisiana (R. 34-35). His father had not actually lived in Louisiana for a period of seventeen years prior to his death. This child did not own property in Louisiana nor was he at any time within the Louisiana court's jurisdiction at the time the application for tutorship was filed or appointment made pursuant thereto (R. 32-35).

THE FEDERAL QUESTIONS SOUGHT TO BE RAISED HAVE BEEN EXPRESSLY PASSED ON.

The Appellant in her jurisdictional statement has presented four questions in her appeal. The first two of such questions are substantially the same, in that she claims that the Supreme Court of Ohio violated the Full Faith and Credit clause of the United States Constitution, Article IV, Section 1, by failing to give credit to the Louisiana decree of tutorship.

If the Ohio Probate Court had jurisdiction to make the guardianship appointment for Donald Peter Fore, then the Full Faith and Credit clause certainly has no application here, since the guardianship decree in Ohio was issued several months prior to the Louisiana tutorship (guardianship). On the contrary, if applicable at all, it was the Louisiana court that was bound to give Full Faith and Credit to the Ohio Probate Court decree. Jurisdiction of the Ohio Probate Court is plenary and exclusive. *Shroyer, Grdn. v. Richmond,* 16 Ohio St. 455; *In re Clendening,* 145 Ohio St. 82, 16 N. E. 2d 676.

The facts are undisputed that when the child, age three years, was orphaned by the tragic death of his parents, he was homeless until the United States military authorities in France surrendered his actual custody to

the Appellee on October 17, 1957, and with whom he has been living up to the present. For a period of approximately twelve days prior to Appellee's appointment as his guardian on December 2, 1957, the minor had resided at the Appellee's permanent home in Cleveland, Ohio.

Neither the child nor his mother had ever lived in Louisiana. If it could be conceded that the minor had a technical legal domicile in Louisiana by reason of his father having lived there when he entered the Military Service seventeen years prior to his death, then what happened to that domicile when the child's parents were killed? He being a minor of tender years, he had no power to select his domicile. The Appellee did not take the child from anyone who had even a remote right to his custody. None of his relatives from either side of the family went over to Europe to get him. Did not this Appellee who stood *in loco parentis* have the power to change his domicile? She is the child's maternal aunt. Section 2151.06 of the Ohio Revised Code states that a child has the same domicile or legal residence as the parents or legal guardian of his person, *or his custodian who stands in the relation of loco parentis.* Loco parentis is a status requiring factual determination. *Layerly v. United States,* 162 Fed. 2d 79; *Dix v. Martin,* 171 Mo. App. 266, 157 S. W. 133, 135; *Kransky v. Glen Alden Coal Co.,* 354 Pa. 425, 42 A. 2d 645, 647; *Corpus Juris Secundum,* Parent and Child, Section 71, notes 60, 61 and 62. *Grandparents as such do not stand in loco parentis to their grandchildren. Sutton v. Menges,* 186 Va. 805, 44 S. E. 2d 414. If a grandparent is *actually* raising a child, then he stands *in loco parentis.* If an aunt is *actually* raising a child, then *she* stands *in loco parentis* to that child. If his residence with Appellee who provided for his care, shelter and support for the several months following the death of his par-

ents was sufficient to change his technical legal fiction of domicile from Louisiana to actual domicile in Ohio at the Appellee's home, then certainly the Louisiana tutorship in April, 1958, was invalid since that court would be without jurisdiction to make such a decree. If that be the case, the Full Faith and Credit clause would not apply. If the child's domicile was Ohio in April, 1958, then the Louisiana tutorship was just as invalid as the Mississippi guardianship of Ida Fore Tillery, the child's paternal aunt, which appointment was made without the child or either of its parents ever having lived in Mississippi and without the child ever being within that court's jurisdiction.

It is submitted, however, that domicile is not necessary to a court's jurisdiction to appoint a guardian for a minor. Only the child's presence or, at most, residence in the court's jurisdiction is required. Sections 2111.02 and 2151.06 of the Ohio Revised Code; *Langan v. Kessinger*, 23 Ohio Law Abs. 392; *In re Murray*, 4 O. N. P. (N. S.) 233; 168 Ohio St. 363, Vol. 31 *Ohio Bar* dated December 29, 1958; *Finlay v. Finlay*, 240 N. Y. 429, 148 N. E. 624; *Wick v. Cox* (1948) 146 Texas 489, 208 S. W. 2d 876; *People ex rel. Noonan v. Wingate*, 376 Ill. 244, 33 N. E. 2d 467; *Stearns, Admr. v. Allen*, 183 Mass. 404, 67 N. E. 349, 97 Am. St. Rep. 441; *Rizo v. Burruel*, 23 Ariz. 137, 202 P. 234, 19 A. L. R. 823; *Taylor v. Collins*, 172 Ark. 541, 289 S. W. 466; *Appeal of Woodward*, 81 Conn. 152, 70 A. 453; *Hopkins v. Gifford*, 309 Ill. 363, 141 N. E. 178; *Kenner v. Kenner*, 139 Tenn. 211, 201 S. W. 779, L. R. A. 1918E, 587; *Sheehy v. Sheehy*, 88 N. H. 223, 186 A. 1, 107 A. L. R. 635; *White v. White*, 77 N. H. 26, 86 A. 353; *Goldsmith v. Salkey* (Tex. Civ. App.) 115 S. W. 2d 778; and 4 *A. L. R.* 2d, p. 16 (in which there are a great many other cases cited in support of this principle). Since mere residence of a dependent child gives a court jurisdiction

over it, then why must the Supreme Court of Ohio be required to ignore the guardianship decree by the Probate Court of Cuyahoga County, Ohio, which was made more than four months prior to the Louisiana decree.

Perhaps Appellant contends that even though mere residence of a child within a court's jurisdiction is sufficient for such court to appoint a guardian for it, such appointment is inferior to a subsequent appointment by a court of its domicile, and therefore Full Faith and Credit is applicable. Should it be conceded that Louisiana was the minor's domicile, it must be remembered that the Louisiana decree was entered without jurisdiction over the person of the respondent or the child. Therefore, the Supreme Court of Ohio is not required to give such credit to the Louisiana decree of tutorship as will preclude it from giving any effect to the order of the Probate Court of Cuyahoga County, Ohio. *May v. Anderson*, 345 U. S. 528, 97 L. Ed. 1221, 73 Sup. Ct. 840; *Cunningham v. Cunningham*, 166 Ohio St. 203, 141 N. E. 2d 172; *New York ex rel. Halvey v. Halvey*, 330 U. S. 610, at p. 615.

On the question of Full Faith and Credit, this Court has expressly ruled in *Halvey v Halvey*, 330 U. S. 615. "that the state of the forum has at least as much leeway to disregard the judgment, to qualify it, or to depart from it as does the state where it is rendered." No notice of the Louisiana appointment was given either to the child or the Appellee with whom he was living. Both were outside the State of Louisiana when that tutorship award was made. Therefore, Ohio is not bound to give Full Faith and Credit to the Louisiana decree. *May v. Anderson*, 345 U. S. 528; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565. Where "Full Faith and Credit" has been denied because (1) the child was not in the jurisdiction (2) the child was not in the physical possession of the guard-

ian, or (3) where there was no jurisdiction over the person who had the child, see *Kline v. Kline*, 57 Iowa 386, 10 N. W. 825; *Commonwealth ex rel. Rogers v. Daven, et al.* (1930), 298 Pa. 416, 148 A. 524; *Graham v. Graham et al.* (1951), 367 Pa. 553, 80 A. 2d 829; *Gilman v. Morgan* (1947), 158 Fla. 605, 29 S. 2d 372; *Black v. Black* (1924), 110 O. S. 392, 144 N. E. 268; *Estin v. Estin* (1948), 334 U. S. 541, 1 A. L. R. 2d 1412. Appellee further contends that custody awards of minor children is a *personam* action. Since the child who is the subject of this action was never in the jurisdiction of the Louisiana court when that appointment was made, such court was without jurisdiction to make the tutorship award and, therefore, the Appellee and said child were immune to any extention of "Full Faith and Credit" to said purported award, it being repugnant to the guarantee of Section 1 of the Fourteenth Amendment of the Constitution of the United States. The judgment sought to be appealed rests upon an adequate nonfederal basis and is not within the jurisdiction of this Court.

In her third Federal question, the Appellant claims that her right of procedural due process law was denied when the Supreme Court of Ohio decided its case with no bill of exceptions before it.

In the opinion and decision, the Ohio Supreme Court said that the bill of exceptions in this instance was not necessary because enough facts were in the Court of Appeals Entry. In such Court of Appeals Entry, the Court said that the case was heard on "the presentations and allegations of the parties being heard and considered, a transcript of testimony taken before a Master Commissioner appointed by this Court and the memoranda of law submitted by the parties hereto, the Court finds * * * etc." The lower court having based its decision on the

transcript of testimony, then such transcript became a part of the record of the case subject to review by the Ohio Supreme Court, and therefore it was unnecessary to have a bill of exceptions in this matter. Since the transcript of testimony was a part of the record in the case and therefore before the Ohio Supreme Court, it had adequate facts upon which it based its conclusions. The law in Ohio has always been well settled that where the decisions of trial is carried into the transcript and exemplifies the errors assigned or where the error is apparent from the record and entries of the trial court, a bill of exceptions is not necessary. *Byrd v. Engles,* 76 Ohio Law Abs. 355; *Bailey v. Progressive Motor Sales,* 101 Ohio App. 173, 138 N. E. 2d 433; *Schwartz v. Sandusky City Savings & Loan,* 65 Ohio App. 437, 30 N. E. 2d 556; Section 2321.12 of the Ohio Revised Code. When no bill of exceptions has been filed, the reviewing court is limited to a review of the record, the pleadings, journal entry and original papers. *Central National Bank v. Newton Steel,* 61 Ohio App. 57, 22 N. E. 2d 428; *Univis Lens v. U. E. W.*, 85 Ohio App. 55, 86 N. E. 2d 802. It is submitted that the Supreme Court of Ohio is capable of interpreting its own statutory law insofar as procedure is concerned.

There is nothing in the Court of Appeals Entry that indicates that it considered any evidence not appearing in the transcript of testimony taken before a master commissioner appointed by that court. Such entry was prepared by Appellant's counsel. Neither the Court of Appeals nor the Appellant has at any time claimed that the court's decision was based on any evidence not appearing in the transcript of testimony. Such transcript shows no disagreement as to the facts involved. Therefore, the evidence appearing in the transcript of testimony is tantamount to an agreed statement of facts which would also eliminate the

necessity of a bill of exceptions under authority of Section 2321.12 of the Ohio Revised Code.

The Appellant for her fourth question claims that the Ohio Supreme Court denied her procedural due process of law guaranteed by the Fourteenth Amendment of the Constitution of the United States, by failing to rule on Appellant's Motion to Strike from Brief of Appellee.

Counsel for Appellee was retained to represent her just the day before the trial in the Ohio Court of Appeals. No transcript of the minutes of the hearing before the New York Supreme Court on November 19, 1957, involving this custody issue, was available at the time of the trial in Ohio. Only Respondent's Exhibit 3 showing the denial of the writ and award of custody to Appellee by the New York court was admitted in evidence by Appellee in the Ohio trial. The Ohio appellate court's (trial court) judgment (two to one decision) was adverse to the Appellee. Shortly thereafter, she filed a Motion to Stay Execution of Judgment in the Ohio Supreme Court pending review, in which she stated that the New York Supreme Court denied the paternal aunt's writ and awarded custody to this Appellee. The Appellant, in opposing said Motion, wrote a letter or brief to the Ohio Supreme Court (Appendix C herein), in which, on page 1, the last full paragraph (p. 15, *infra*), denied that the New York court had awarded custody to Appellee, and stated further that the New York court had denied the writ of habeas corpus filed by the paternal aunt on the basis that the Mississippi judgment was void in that such court had no jurisdiction to appoint a guardian. That was an extrajudical statement never offered in evidence in the trial court. Thereafter, the Appellee obtained the Minutes of the New York hearing which proved that the extrajudicial statement by Appellant was false, and so attached the Minutes of the New York hearing to her brief.

Where a litigant makes an evidentiary statement to a reviewing court which is not in evidence, may not the answering litigant offer proof to the same court that such evidentiary statement is false?

Since the Ohio Supreme Court did not rule on Appellant's aforementioned Motion, it is unknown whether that court considered the Minutes of the New York hearing which was attached as Appendix A to Appellee's brief filed therein. Is one permitted to speculate on the Ohio Supreme Court's consideration of Appellee's said Appendix A? That Court's opinion does not disclose any more than appears in Respondent's Exhibit 3; therefore, how can it be shown that procedural due process was lacking?

FEDERAL QUESTIONS SOUGHT TO BE RAISED ARE NOT SUBSTANTIAL.

Appellee respectfully submits that the claimed Federal questions are not substantial. Donald Peter Fore, the minor child, had never lived in Louisiana, was never cared for or maintained by Appellant, and was not within the Louisiana court's jurisdiction at the time of Appellant's appointment as tutrix. On the contrary, since October 25, 1957, following the death of his parents in September, 1957, he had lived continuously with Appellee who is domiciled in Cleveland, Ohio. He was not removed by Appellee from the residence of anyone else who was even remotely interested in him. Could not his domicile be then in Ohio at the time of the Louisiana tutorship appointment on April 11, 1958? The Appellant had expressed no desire or request to gain possession of the child until seven months after the death of the child's parents. The Ohio Supreme Court did not state that the child's domicile was not in Ohio. It merely stated that even if the Appellant's claim of Louisiana domicilliary was true, the Ohio Probate

Court had personal jurisdiction over the child at the time of its guardianship decree which was prior to the Louisiana decree. This Court is not a fact-finding tribunal.

On the question of "Full Faith and Credit," this Court has expressly ruled in *Halvey v. Halvey*, *May v. Anderson* and *Pennoyer v. Neff*, that "the state of the forum has at least as much leeway to disregard the judgment, to qualify it or to depart from it as does the state where it is rendered."

It is submitted that the Ohio Supreme Court did not decide in this case any Federal question of substance not theretofore determined by this Court, nor has the state court decided any question which is in any way not in accord with the applicable decisions of this Court. No real or substantial Federal question is involved in this appeal and, therefore, the Motion of the Appellee to dismiss the appeal or affirm the Ohio Supreme Court decision should be granted.

Respectfully submitted,

CHARLES C. REDMOND,
719 National City Bank Bldg.,
Cleveland 14, Ohio,
Attorney for Appellee.

APPENDIX A.

Ohio Revised Code Section 2151.06.

Sec. 2151.06. Residence or legal settlement.

Under sections 2151.01 to 2151.54, inclusive, of the Revised Code, a child has the same residence or legal settlement as his parents, legal guardian of his person, or his custodian who stands in the relation of loco parentis.

APPENDIX B.

Ohio Revised Code Section 2321.12.

Sec. 2321.12. Disposition of bill of exceptions.

It is not necessary to make an entry upon the journal of the court of the settling, allowance, and signing of a bill of exceptions. The signature of the trial judge, or the other judge acting for him, in allowing, settling, and signing it is sufficient evidence of such fact. The signature of such judge may be dispensed with by agreement of the parties and when all the parties, individually or by their attorneys of record, stipulate that the bill of exceptions is a true bill of exceptions, it shall be filed and considered as such without the signature of the judge. In cases tried in courts of record the certificate of the official court reporter attached to the transcript of the testimony is sufficient verification of the bill and the signature of the judge is not necessary, unless within ten days after notice to the adverse party of the filing of such bill, said adverse party files objection or amendment to such bill, in which case said bill shall be submitted to the court for settlement as provided in sections 2321.06 to 2321.10, inclusive, of the Revised Code. A bill is not necessary in a case in which the entry of judgment shows that the case was tried on an agreed statement of facts and such agreed statement was filed with the papers in the case.

APPENDIX C.

Appellee's Brief Filed in Ohio Supreme Court.

(Filed July 30, 1958.

McAfee, Grossman, Taplin, Hanning, Newcomer & Hazlett

Law Offices
Cleveland

The Supreme Court of Ohio
Columbus, Ohio

Re: Ella V. Fore, Petitioner-Appellee v. Jakobine Toth, Respondent-Appellant.

Your Honors:

This is written in response to and comment upon the "Brief" attached to Respondent-Appellant's "Motion For Stay Of Execution Of Judgment" in the above matter now on appeal to this Court from the Court of Appeals of Cuyahoga County; a brief in opposition to such anticipated Motion has been filed by us with the Supreme Court.

In Respondent's brief it is stated that Mrs. Fore, the Petitioner, is in "poor health." This is not borne out by the record. As the Court of Appeals said in its Opinion at pages 3 and 4 attached to our brief in opposition to the Motion:

> "There has been as yet no contest as to what is for the best interests of the child, nor could such question be litigated in this state on the undisputed facts here presented. Does the respondent suggest that the state of the child's domicile, Louisiana, is incapable of seeing to its welfare? Does the respondent seek, should disaster again strike, to burden this state with the continued care of the child or should she then attempt to surrender his custody to the state of his domicile? The suggestion that the relator, being seventy-seven

years of age, is incapable of caring for the child, is not supported by the record in this case. The facts are that Ella Fore has raised nine children and one grandchild, some of whom have had very acceptable army careers."

Nor did the New York Court "award custody" of the child to Mrs. Toth. It simply refused to grant the writ of habeas corpus filed by the paternal aunt on the basis of a Mississippi judgment which was equally as void as the judgment of the Probate Court of Cuyahoga County. Neither state had any jurisdiction to appoint a guardian.

For reasons pointed out in our brief in opposition to this Motion the Petitioner, Mrs. Fore, was immediately and is now entitled to the custody of the child. No conceivable hardship can come to the child in carrying out the thoroughly considered judgment of the Court of Appeals, nor indeed in law can it be otherwise.

Respectfully submitted,

MAURICE F. HANNING,
KING ROSENDALE.

FILE COPY

In the Supreme Court of the United States

OCTOBER TERM, 1958.

No. 740.

ELLA V. FORE,
Appellant,

vs.

JAKOBINE TOTH,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO

BRIEF OF APPELLANT
Opposing Appellee's Motion to Dismiss or Affirm.

MAURICE F. HANNING,
J. KING ROSENDALE,
1500 Midland Bldg.,
Cleveland, Ohio,
Counsel for Appellant

McAFEE, HANNING, NEWCOMER & HAZLETT,
1500 Midland Bldg.,
Cleveland, Ohio,
Of Counsel.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 1-5647

TABLE OF AUTHORITIES.

Cases.

Hughes v. Fetter, 341 U. S. 609	3
Pink v. A. A. A. Highway Express, 314 U. S. 201	3
Sublett, In re, 169 Ohio St. 20	2, 3

Text.

Restatement of the Conflict of Laws	3, 4

Statute.

Ohio Revised Code, Section 2151.06	5

In the Supreme Court of the United States

OCTOBER TERM, 1958.

No. 740.

ELLA V. FORE,
Appellant,

vs.

JAKOBINE TOTH,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO.

BRIEF OF APPELLANT
Opposing Appellee's Motion to Dismiss or Affirm.

In reply to Appellee's contentions we respectfully submit the following:

1. Appellee endeavors to show that this case was not decided in a vacuum by the Supreme Court of Ohio and that due process was not therefore offended by stating as to her failure to file a bill of exceptions with the Supreme Court of Ohio bringing up the transcript of the evidence taken before the Court of Appeals by saying:

> "The lower court having based its decision on the transcript of testimony, then such transcript became a part of the record of the case subject to review by the Ohio Supreme Court, and therefore it was unnecessary to have a bill of exceptions in this matter."

This is indeed novel law. In Ohio there is one and one way only to present the transcript of evidence to the reviewing court and that is by a bill of exceptions. The Supreme Court of Ohio itself in its opinion stated that it

determined the errors of the Court of Appeals from the journal entry alone of that Court (168 Ohio St. at page 372):

> "Since the error which is the basis of this reversal is apparent from the entry of the Court of Appeals, it is not necessary to our decision that there is a bill of exceptions. The motion of Appellee to dismiss is therefore overruled."

Yet that journal entry states no facts but only conclusions of law (R. p. 19 and Appendix C to Jurisdictional Statement).

That this decision of the Supreme Court of Ohio made with *no facts* before it was violative of procedural due process of law is made the more manifest by a decision rendered by that Court on March 18, 1959, approximately two and one-half months after the decision which is the subject of this appeal. In the case of *In re Sublett*, 169 Ohio St. 20, the Court in a habeas corpus action which originated in the Court of Appeals of Franklin County, Ohio, followed the law of Ohio, which it has applied uniformly in every case but this present one, by holding that since no bill of exceptions had been filed with it, the appeal would be dismissed.

The Court stated:

> "*Per Curiam*. The cause has been submitted on the transcript of docket and journal entries and the original papers filed in the Court of Appeals. There being no bill of exceptions, the court cannot say that there was no substantial evidence warranting the Court of Appeals in reaching the conclusion it did. On appeal on questions of law, all reasonable presumptions consistent with the record will be indulged in favor of the validity of the judgment under review and of the regularity and legality of the proceeding below.

"The judgment of the Court of Appeals is affirmed.
"Judgment affirmed."

Nothing could better emphasize the failure of the Supreme Court of Ohio to accord this Appellant procedural due process of law in deciding the instant case with no bill of exceptions before it than *In re Sublett*. In that case as this, there was an appeal of right in a habeas corpus action from a Court of Appeals. In that case as this there was no bill of exceptions, but the Court had before it only the transcript of docket and journal entries and original papers filed in the Court of Appeals. Yet contrary to all the Ohio decisions on the point and contrary to its subsequent decision in *In re Sublett*, in the instant case the Court disregarded the necessity for a bill of exceptions, found facts where none existed in the journal entry of the Court of Appeals, and reversed the Court below.

2. Appellee chiefly relies upon the theory that the mere bringing into and physical presence of the child in Ohio was sufficient to give the Probate Court of Cuyahoga County, Ohio jurisdiction to appoint Appellee the guardian. This we contend is not the law, but since the Supreme Court of Ohio so held in this case, it is then for this Court itself to follow its self-announced duty of deciding between the competing policies of Louisiana and Ohio, both of which have asserted jurisdiction. See *Hughes v. Fetter*, 341 U. S. 609, 611, and *Pink v. A. A. A. Highway Express*, 314 U. S. 201, 210. Certainly the rules of the *Restatement of the Conflict of Laws* are that only the state of the child's domicil may appoint a guardian and that mere physical presence is not sufficient to give jurisdiction. This rule is supported by the great weight of authority on the subject, and the cases to the contrary are almost without exception cases involving the struggle between parents over children attendant upon divorce.

3. Equally the authorities, including the *Restatement of Conflict of Laws*, make clear that the state of the child's domicil exclusively has the power to appoint a guardian. Although the child is not present within the jurisdiction of the domiciliary state, such a decree is entitled to full faith and credit. *Restatement of Conflict of Laws*, § 117, Note d, "*Effect in other states of appointment of guardian.* The exercise by a state of jurisdiction through its courts under the rule stated in this section will be recognized in other states * * *." The rule of § 117 of the *Restatement* as set forth in the Jurisdictional Statement at page 14 thereof is that only the state where the child is domiciled may appoint a guardian for the child. The Ohio Supreme Court itself recognized the child was domiciled in Louisiana in its decision and syllabus.

4. There was before the Court of Appeals and before the Supreme Court of Ohio absolutely no question of suitability as to who was the proper guardian of the child. That question could and can only be determined by the state having jurisdiction to appoint a guardian. That state is Louisiana, the state of the parents' and the child's domicil.

5. The State of New York had absolutely no power to make an award of custody to Appellee in the habeas corpus action brought by Mrs. Ida Fore Tillery, one of the child's paternal aunts. Mrs. Tillery brought the action based on the Mississippi order appointing her the child's guardian. When the New York Court denied that writ it simply left the Appellee in possession of the child, and she went on into Ohio and immediately obtained the *ex parte* Ohio decree appointing her the guardian.

6. Nor was Appellee acting in the capacity of *loco parentis*. She had simply been given possession of him by the

Army for transportation to the United States, and in total disregard of the rights of the child's other relatives including two paternal aunts and the Appellant, obtained the *ex parte* Ohio decree immediately on her arrival with the child in Cleveland, Ohio.

7. Obviously Section 2151.06, Ohio Revised Code, being a part of the Juvenile Court Act of Ohio, has no application to this case, as it deals with the appointment of custodians for abandoned and neglected children by the Juvenile Courts of Ohio. This child was never the subject of any action in any Juvenile Court, nor did the Supreme Court of Ohio even mention this statute in reaching its decision.

8. Appellee seeks to justify the introduction in her brief in the Supreme Court of Ohio, of the so called "Record" of the Supreme Court of New York upon the basis of our letter in opposition to Appellee's Motion For Stay of Execution of Judgment of the Court of Appeals in which we stated that the New York Court did not "award custody" of the child to Appellee. Obviously all it could do or had the power to do, all of the parties to that action being non-residents of New York, was to grant or deny the application of Mrs. Tillery based on the Mississippi judgment. To the extent that it purported to do more it exceeded its jurisdiction. As the Court of Appeals said in its opinion:

> "The dismissal of the petition for a writ of habeas corpus in the New York case (although the record is silent on the question) could be for the same reason the respondent should not prevail here. That is the authority depended on as the basis for seeking custody was not from the state of the child's domicile." 151 N. E. (2d) 777 at 782.

Evidently Appellee thought so too, for she immediat ly upon arrival in Ohio, sought custody of the child in the Probate Court of that state. Our letter merely went to the Motion to stay execution of the judgment of the Court of Appeals. That issue was determined by the Chief Justice of the Supreme Court and the stay was granted. Certainly it afforded no justification for the Supreme Court of Ohio not to rule upon *and utterly disregard* Appellant's Motion to strike this unauthenticated "Record" which had never been introduced into evidence. The appeal to the Supreme Court of Ohio was on questions of law and that Court on review could only consider the evidence introduced before the Court of Appeals as embodied in a bill of exceptions. No such bill was filed and certainly that Court had no right to consider material in the nature of evidence not introduced before the trial court and ignore Appellant's Motion to strike the same. No issue was before the Supreme Court of Ohio as to the New York action, involving as it did *different parties in a separate action.*

Accordingly, we submit that the federal questions presented are substantial and important, and that the Motion to Dismiss or Affirm should be overruled.

Respectfully submitted,

MAURICE F. HANNING,
J. KING ROSENDALE,
Attorneys for Ella V. Fore, Appellant.

McAFEE, HANNING, NEWCOMER & HAZLETT,
1500 Midland Bldg.,
Cleveland 15, Ohio,
Of Counsel.

LE COPY

Office Supreme Court, U.S.
FILED
APR 6 1959
JAMES R. BROWNING, Clerk

No. 740

In the Supreme Court of the United States

OCTOBER TERM, 1958

ELLA V. FORE, APPELLANT

v.

JAKOBINE TOTH, APPELLEE

On Appeal from the Supreme Court of Ohio

Motion to File Brief and Brief Of the State of Louisiana, Appearing Amicus Curiae In Support of Appellant

JACK P. F. GREMILLION,
Attorney General of the State of Louisiana.

No. 740

In the Supreme Court of the United States

OCTOBER TERM, 1958

ELLA V. FORE, APPELLANT

v.

JAKOBINE TOTH, APPELLEE

On Appeal from the Supreme Court of Ohio

MOTION TO FILE BRIEF

Comes now the State of Louisiana, through its Attorney General, and begs leave to file brief amicus curiae in support of Appellant herein.

JACK P. F. GREMILLION,
Attorney General of the State of Louisiana.

April, 1959

PRELIMINARY STATEMENT

Appellant appeals from the judgment of the Supreme Court of Ohio entered on January 14, 1959, denying her Application for Rehearing from the judgment of that Court entered on December 24,

1958, setting aside the judgment of the Court of Appeals for the Eighth District, Cuyahoga County, Ohio.

A complete summary of the opinions below, jurisdiction of this Court and a statement of the facts and questions presented by this case is contained in the appeal previously filed by appellant in this Court, to which the State of Louisiana respectfully makes reference.

The appellant, Ella V. Fore, is a citizen and resident of the State of Louisiana. She is duly qualified by the Fifth Judicial District Court of the State of Louisiana, Parish of Franklin, as tutrix (guardian) of the person and property of Donald Peter Fore, her minor grandson, the sole surviving child of her son, Donnie R. Fore. Before his death, appellant's son had his domicile in the State of Louisiana, and appellant's grandchild has his present domicile in the State of Louisiana.

The State of Louisiana appears before this Court as amicus curiae in support of the appeal of Mrs. Ella V. Fore, Appellant, and submits this brief in accordance with Rule 42 of the Revised Rules of this Court.

THE FACTS

Donnie R. Fore, a Master Sergeant in the United States Army, and his wife were tragically killed in an automobile accident near Ingrandes, France, on September 7, 1957. Their only child was Donald Peter Fore. The Appellee, a resident of Cleveland, Ohio, is the sister of the deceased mother of the minor child. The Appellee went to Europe for the funeral of her

sister, and, while there, succeeded through legal counsel in convincing the Army authorities in France to permit her "to escort" the minor child to the United States. During the same period of time, appellant was making arrangements to receive the child. Appellee, however, returned with the child to Cleveland, Ohio, and in an ex parte proceeding, without notice to anyone, was awarded custody of the child by the Probate Court of Cuyahoga County, Ohio.

Appellant thereafter learned of the whereabouts of the child, qualified as the tutrix of the child under Louisiana law in the court of the child's Louisiana domicile, and brought a habeous corpus proceeding in the Court of Appeal of Cuyahoga County, Ohio, for custody of the child. That Court awarded custody to Appellant, but was reversed by the Supreme Court of Ohio. This appeal is from the decision of the Supreme Court of Ohio.

These are the primary facts of this case, stated in more detail by Appellant in her appeal.

THE INTEREST OF THE STATE OF LOUISIANA

Not only is Appellant a citizen of Louisiana, but she is duly qualified tutrix of the person and property of the minor child, Donald Peter Fore. The Court which qualified Appellant as tutrix is not only the Court of her domicile, but the Court of the domicile of Appellant's deceased son and of the domicile of the minor child. There is no serious question but that the domicile of all of these persons was in the Parish of Franklin, State of Louisiana. Notwithstanding the

facts and law of domicile, the Supreme Court of Ohio has awarded custody of this Louisiana child to a resident of Ohio. In so doing, that Court has ignored the law of Louisiana, the law of conflicts of law and the Constitution of the United States. The interest and concern of the State of Louisiana in this case is for the protection of its citizens against deprivation of rights accorded them under the law of domicile, and in the enforcement of its statutes in that regard and in the judgment aforesaid rendered by a Court of the State of Louisiana.

THE DECISION APPEALED FROM, AND ITS IMPORTANCE

The Supreme Court of Ohio has held in this case that irrespective of the Louisiana domicile of this child, the State of Ohio has jurisdiction to award custody of the child in an ex parte proceeding, and that refusal to recognize the judgment of the Court of the Louisiana domicile of the child does not offend the Full Faith and Credit Clause of the United States Constitution.

The State of Louisiana asserts that the judgment of the Supreme Court of Ohio is erroneous, and implicit in the decision are important choices of policy which affect not only proper relationships between the States of the Union, but also rights of citizens of the several states. The attention and guidance of this Court are required to determine these matters of policy, not only for courts of law, but, also, under the facts of this case, for proper administration of persons and

dependents of persons serving in the Armed Forces of the United States.

OHIO'S THEORY OF JURISDICTION, AND WHY IT IS ERRONEOUS

The Supreme Court of Ohio states in its opinion, 168 Ohio St. 363:

> "Unless compelled by some **Ohio statute** to find to the contrary, we are of the opinion that the Ohio court had **inherent jurisdiction** to determine the custody of Donald, **irrespective** of his domicile." Id. at p. 367 (emphasis added).

It is at once apparent that this conclusion is directly contrary to established jurisprudence. See opinion of Court of Appeals of Cuyahoga County in this case, 151 N.E. (2d) 777, 79 Abs. 15; Restatement of Conflict of Laws, Sections 117, 144, 149 and 151; Annotation, 4 A.L.R. 2d 7; *Lehmer v. Hardy*, et al., 294 Fed. 407; *Shorter v. Williams*, 74 Ga. 539; *In the Matter of the Appointment of a General Guardian of Maude and Mabel Hubbard, Infants*, 82 N.Y. 90.

These authorities, and others, stand for the proposition that the state of a child's domicile has exclusive jurisdiction to determine custody.

The Supreme Court of Ohio all but conceded that it was announcing a novel theory in this case, when it stated:

> "Part of the genius of the law is that old 'rules' give way to new ones which better reflect the basic principles which undergirded the former." 168 Ohio St. 363 at p. 368.

To justify announcement of its "new rule," the Court reasoned that the only connection between this child and Louisiana rests on a tenuous and technical idea of domicile; that in an abnormal situation, such as the present one where both parents are dead, the trial judge should be guided not so much by legalistic formulae as by considerations which have a bearing upon the ultimate interests of the child; that whereas formerly the domicile was the center of a family's life and exclusive jurisdiction was in the court of domicile for that reason, in these days of mobility of population, wherever a child is found may be where his interests are centered, and the welfare of society and of the child demand that jurisdiction be permitted to the place of physical presence of the child; that this concep. has its origin in protection of the helpless; that while Ohio does not consider domicile unimportant on the **merits** of a case of this kind, the issue in this case is **jurisdiction,** which must be supported according to the best interests of the child.

The State of Louisiana submits that the reasoning of this decision is spurious under the facts of this case, deserving refutation by the considered judgment of this Court.

The Supreme Court of Ohio considers that only a tenuous and technical idea of domicile connects this child with Louisiana. The place of birth of this child's father and place of residence of this child's grandmother, his closest living relative in the United States, is brushed aside as a tenuous and technical idea. It

is evident that the position taken by the Ohio court is not that Appellant asserts a tenuous and technical idea of domicile, but that domicile is a tenuous and technical idea. Such a view is indeed revolutionary, and opens an unchartered path to legal uncertainty. If domicile is not important here, why is it important in any field of law? The many personal rights and obligations of great consequence presently determined by domiciliary law—how personalty is divided intestate estates, validity of wills, establishment of legitimacy, personal taxation, validity of marriage and divorce and the right to vote, to name a few examples—can hardly be properly distinguished from determination of custody, insofar as they all depend upon the exclusive application of the law of domicile.

The view taken by the Ohio court is less realistic and less understandable when it is realized that the only connection between this child and Ohio is the physical presence of the child in Ohio. The child is there because of the chance administrative decision by an Army officer in France, albeit as the result of the stratagem of Appellee.

The Ohio theory goes further, however, and states that jurisdiction should attach under these facts because of considerations which have a bearing upon the ultimate interests of the child.

The ex parte Ohio guardianship proceedings, however, **did not consider** the best interests of this child. Appellant, Mrs. Fore, was certainly given no notice, and the Probate Court of Cuyahoga County, Ohio,

merely granted the application of guardianship without any question being raised as to the interests of the child. The Probate Court knew that the closest living relative of the child in the United States was his paternal grandmother, and, ignoring this fact, granted the application. There is no evidence that Jakobine Toth was better able to take care of the child in any way.

If it be said that the Probate Court need not have had a **contradictory** hearing in order to determine the best interests of the child, the Ohio theory suffers even a greater weakness. It is obvious that unless a contradictory hearing is held, the best interests of the child will **always** be found to be with the ex parte applicant. Thus, persons with interest but without knowledge of the ex parte hearing will have the burdens of first discovering that such hearings have been held, and then in having the hearings re-opened in order to set forth what are the true interests of the child.

The Ohio Court states that the concept of jurisdiction announced in this case has its origin in protection of the helpless. But this child had absolutely no previous connection with the State of Ohio, did not suffer the death of his parents in Ohio, had never lived in Ohio, was not in any way a public charge in Ohio, but was designedly **taken** into Ohio by Mrs. Toth. She was given possession of the child by the Army undoubtedly as an expediency in transporting the child to the United States. Certainly the United States Army has no power

to determine custody in cases of this kind, and it did not apply the law of domicile. The State of Louisiana submits that if anyone is helpless in this situation, it is Appellant, who has suffered delay, heartbreak and expense because of a technical, tenuous and novel theory announced by the Supreme Court of Ohio.

The Supreme Court of Ohio stated in its reasons, "we do not, of course, suggest that the location of the child's domicile is unimportant in deciding the merits of a custody case. Indeed, it may be of prime importance in a decision as to which of **two competing persons** is to be granted the custody. (Emphasis added). However, these considerations go to the **merits** of the case and not to **jurisdiction,** which was the basis of the Court of Appeals judgment."

If the best interests of the child are to be considered as the basis of jurisdiction, and if the best interests are to be determined in an ex parte proceeding, there are not two persons competing for custody, and under the Ohio theory, **jurisdiction** will always attach. The unworkable practical aspects of this theory seem obvious. "Jurisdiction" means the power of a court to act, as distinguished from reaching a decision made after consideration of all of the facts. How could the Probate Court know all of the facts in this case? How could the best interests of the child be known? Yet under the Ohio theory, the domicile of the child (the traditional test of jurisdiction) is referred to the merits of the case, and a consid ration of the best interests of the child (the traditional test on

the merits of the case), becomes the basis of jurisdiction, in spite of the fact that only one party is before the Court!

Finally, under the Ohio theory, the physical presence of a child within a state not only gives that state jurisdiction, but gives that state **exclusive jurisdiction.** This is because the Ohio Court refuses to give full faith and credit to the judgment of the Louisiana court of domicile.

The Supreme Court of Ohio stated, "The final claim of petitioner is that the Full Faith and Credit Clause of the Constitution of the United States (Section 1, Article IV) requires us to give such credit to the Louisiana decree of 'tutorship' as will preclude us from giving any effect to the order of the Probate Court of Cuyahoga County. The Louisiana decree was entered without jurisdiction over the person of the respondent or the child. We are, therefore, not required to give such effect to that decree as to require the respondent to deliver the child to the petitioner. This is the philosophy underlying *May v. Anderson*, 345 U.S. 528, 97 L. Ed. 1221, 73 S. Ct. 840. See also *Cunningham v. Cunningham*, 166 Ohio St. 203, 141 N.E. (2d) 172; *New York ex rel. Halvey v. Halvey*, 330 U.S. 610, 91 L. Ed. 1133, 67 S. Ct. 903."

The Supreme Court of Ohio thus holds that jurisdiction arises because of physical presence of the child, and because the child was not physically present in the State of its domicile, Louisiana does not have jurisdiction. Of course, the child was not physically present

in Louisiana because he had been taken to Ohio by Mrs. Toth. We thus return to tribal rules of possession. This theory is no modern concept of what is best for the child, but represents the most primitive of concepts. The practical result is that fortuitous circumstances, giving rise to the practice of stealth and stratagem, are rewarded under the Ohio theory by virtue of exclusive jurisdiction in the place where the child is finally taken.

FULL FAITH AND CREDIT HAS BEEN DENIED BY THE SUPREME COURT OF OHIO

Article IV, Section 1, of the Constitution of the United States provides in part:

> "Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. * * *"

Against this Constitutional command, the Ohio Court states that no faith and credit is given the Louisiana decree because Louisiana did not have jurisdiction over the person of the child or of respondent.

As stated in *Milwaukee County v. M. E. White Co.*, 296 U.S. 268, 80 L. Ed. 220, 56 S. Ct. 229 (1935),

> "The very purpose of the full-faith and credit clause was to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation

might be demanded as of right, irrespective of the state of its origin. That purpose ought not lightly to be set aside out of deference to a local policy which, if it exists, would seem to be too trivial to merit serious consideration when weighed against the policy of the constitutional provision and the interest of the state whose judgment is challenged."

What are the rights under Louisiana law enjoyed by appellant which have been denied? The following are articles of the Civil Code of Louisiana, introduced in evidence in the trial court:

> Article 307: "The appointment, recognition or confirmation of tutors must be made by the judge of the parish where the minor has his domicile, if he has a domicile in the State * *."
>
> Article 263: "When a tutor has not been appointed to the minor by father or mother dying last, or if the tutor thus appointed has not been confirmed or has been excused, then the judge ought to appoint to the tutorship the nearest ascendant in the direct line of the minor."
>
> Article 266: "The grandmother of the minor is the only woman who has a right to claim the tutorship by the effect of the law, but she is not compelled to accept it."

These and other articles of the Civil Code of Louisiana create vested rights of citizens of Louisiana, govern their status, and should be applied as against all the world. That statutes are "public acts" entitled to Full Faith and Credit is no longer questioned. *Bradford Electric Light Co. Inc. v. Clapper*, N.H.

1932, 286 U.S. 145, 76 L. Ed. 1026, 52 S. Ct. 571. The moment that the parents of this child died, the foregoing articles of the Civil Code of Louisiana were applicable. Moreover, a judgment of the court of this child's domicile qualified Appellant as tutrix of the child in accordance with these and other applicable Louisiana statutes.

The Supreme Court of Ohio has arbitrarily chosen to ignore these statutes and judgment. But the power of a state to determine the limits of the jurisdiction of its courts and the character of the controversies which shall be heard therein is subject to the limitations imposed by the Federal Constitution, and a State cannot escape its constitutional obligations under the full faith and credit clause by the simple device of denying jurisdiction in such cases to Courts otherwise competent. See the opinion of Mr. Justice Brandeis in *Broderick v. Rosner*, 294 U.S. 629, 79 L. Ed. 1100, 55 S. Ct. 589.

Nor are the cases of *May v. Anderson*, 345 U. S. 528, 97 L. Ed. 1221, 73 S. Ct. 840 and *New York, ex. rel. Halvey v. Halvey*, 330 U.S. 610, 91 L. Ed. 1133, 67 S. Ct. 903, persuasive or controlling in the instant case. Both were divorce cases involving the struggle **between parents** as to the custody of the children and the award of custody was an integral part of the divorce action in each case. Unlike the instant case, in the *Halvey* case, supra, all parties were before the trial court on a hearing on the **merits** of the case. Unlike the instant case, *May v. Anderson*, supra, was

limited to a struggle between parents.

In *May v. Anderson*, contrary to the opinion of the Supreme Court of Ohio, no "philosophy" underlay the decision. Mr. Justice Burton, the organ of this Court, was specific in noting that a narrow issue was presented. Mr. Justice Frankfurter, in his concurring opinion, stated that the decision was limited to the circumstances before this Court in that case. Justices Jackson and Reed dissented from the holding even under the limits imposed by this Court. It is clear that *May v. Anderson* is not a precedent for this case.

CONCLUSION

As stated in the opinion of the Court of Appeals below,

> "In the case here being considered, it must be remembered that the controversy is not between parents. As is indicated in the annotation just cited (the Court had referred to the annotation in 4 ALR 2d 7), many times in disputes between husband and wife or in protecting an abandoned child, residence is sufficient to vest a court with jurisdiction. The legal right to the custody or the responsibility for the support and care of Donald Peter Fore as between the remaining members of his family has never been the subject of an action before a court of competent jurisdiction. The respondent just took the child without legal right or authority and with total indifference to all others equally entitled or with prior right to be considered in a proper

action to be adjudged the guardian of such minor child."

The State of Louisiana submits that the decision of the Supreme Court of Ohio, if left untouched, will constitute an ill-considered and dangerous precedent with heartbreaking consequences to the families of men and women serving in the armed forces of the United States. The State of Louisiana respectfully urges this Court to reverse the judgment appealed from, and to reinstate the decree of the Court of Appeals for Cuyahoga County, Ohio, awarding custody of the minor, Donald Peter Fore, to his grandmother, Mrs. Ella V. Fore, Appellant, duly qualified tutrix of the child by virtue of the judgment of the Fifth Judicial District Court, Parish of Franklin, State of Louisiana.

Respectfully submitted,

JACK P. F. GREMILLION,
Attorney General of the
State of Louisiana.

Appearing Amicus Curiae
in support of Appellant,
Mrs. Ella V. Fore

PROOF OF SERVICE

I, Jack P. F. Gremillion, Attorney General of the State of Louisiana, and a member of the Bar of the Supreme Court of the United States, certify that on the _____ day of April, 1959, I served a copy of the foregoing motion to file brief and brief as amicus curiae in support of Appellant on Charles C. Redmond, Esquire, 719 National City Bank Building, Cleveland 14, Ohio, attorney of record for Appellee, by depositing a copy of same in the United States air mail, with sufficient prepaid postage attached.

Baton Rouge, Louisiana, April _____, 1959.

JACK P. F. GREMILLION,
Attorney General of the State of Louisiana.